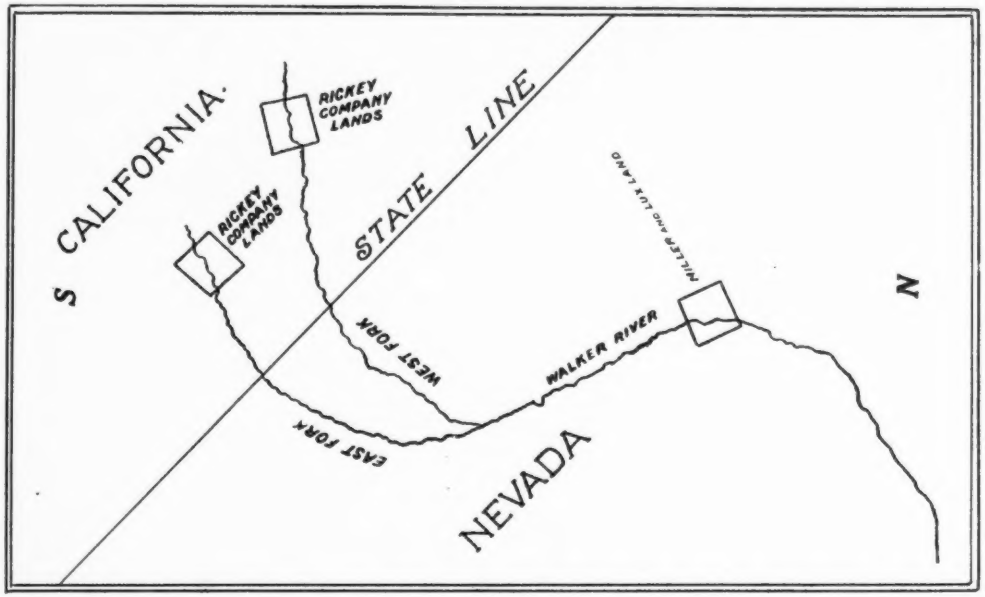
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RICKEY COMPANY LANDS
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STATE LINE
MILLER AND LUX LAND
N
WEST FORK
WALKER RIVER
EAST FORK
NEVADA

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No.

RICKEY LAND AND CATTLE COMPANY, A CORPORATION, PETITIONER,

vs.

MILLER & LUX, A CORPORATION, RESPONDENT.

BRIEF OF PETITIONER.

The proceedings herein are prosecuted from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court for the District of Nevada, enjoining petitioner from prosecuting two actions in the Superior Court of Mono County, State of California, on the ground, that the necessary effect of the prosecution of said actions would be, *to bring on for trial and determination the same issues as theretofore had been tendered by a certain action brought by respondent in the United States Circuit Court for the District of Nevada*, and thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will

be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Petitioner owns two tracts of land in the State of California, marked on the plat, Rickey Company Lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Petitioner claims a right to a certain definite quantity of the waters of each branch of the said river within the State of California, wherewith to irrigate its said lands.

Respondent owns certain lands on the main Walker River in the State of Nevada, noted on the plat as Miller & Lux Lands, and claims a right to a certain definite quantity of the waters of the said river in the State of Nevada wherewith to irrigate said lands.

On July 10, 1902, said Miller & Lux commenced an action in the United States Circuit Court for the District of Nevada against one Thomas B. Rickey and 137 other defendants, and alleged that it was the owner, by appropriation, of certain rights in the waters of the Walker River in the State of Nevada, and sought to enjoin the defendants in that action from diverting water from the Walker River and depriving it of the waters to which it was entitled (Trans., pp. 2 and 3, folios 3, 4, 5, and 6).

On August 4, 1902, said defendant, T. B. Rickey, filed his plea to the jurisdiction of the said United States Circuit Court for the District of Nevada, setting up the facts that the Walker River rises in the State of California and flows through said State and therefrom into the State of Nevada, and that he owned certain lands on the said Walker River in the State of California, and claimed the right to divert water from the said Walker River in the State of California for the irrigation of the said lands, but disclaimed any claim of right or intention to divert any water from the said Walker

River in the State of Nevada (Trans., p. 2, folio 3, Miller & Lux *vs.* Rickey *et al.*, 127 Fed., 576).

Wherefore, said T. B. Rickey pleaded that the said United States Circuit Court for the District of Nevada had no jurisdiction to determine his right to appropriate and divert water from the Walker River in the State of California. His said plea was thereafter overruled (Trans., p. 2, folio 4, Miller & Lux *vs.* Rickey, 127 Fed., 576).

On the 6th day of August, 1902, said T. B. Rickey sold his said lands and water rights in the State of California to the Rickey Land and Cattle Co., a corporation, petitioner herein, which said lands are the lands designated on the plat (Trans., p. 3, folio 7).

On the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner, commenced two actions in the Superior Court of Mono County, State of California, against said Miller & Lux and some three hundred other defendants, wherein it alleged that it was the owner of the right to divert and appropriate certain waters of the Walker River in the State of California, and sought to quiet its title to its water rights in the said Walker River in the State of California (Trans., pp. 4 and 5, folios 8-11).

Thereafter said Miller & Lux, respondent, brought this action in the United States Circuit Court for the District of Nevada, to enjoin petitioner from prosecuting said actions in the Superior Court of Mono County, State of California, on the sole ground *that the necessary effect of the two last-mentioned actions was to bring on for trial and determination in said Superior Court the same issues as were tendered by the bill of complaint in the said original action of Miller & Lux vs. T. B. Rickey, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the United States Court in the said action, and thereby defeat the jurisdiction of the United States Circuit Court for the District of Nevada (Trans., p. 7, folios 15, 16)*. An interlocutory order and decree restraining appellant herein from prosecuting said actions in the

California court was thereafter entered (Trans., p. 28, folio 64), and from such order and decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, where said decree was affirmed (146 Fed., 574).

Certain of the questions involved in this case, and particularly the opinion of the Circuit Court of Appeals herein, were fully and carefully discussed in petitioner's brief in support of the petition for the writ of certiorari herein. In view of that fact and of the length it is foreseen an adequate presentation of the points herein to be covered will require, it is deemed advisable not to recapitulate the arguments presented in the previous brief, any further than may be essential to give continuity to the present argument, but to respectfully refer the court for such discussion to the said brief heretofore filed herein.

There is a single question involved in this petition. *It is as to the jurisdiction of the United States Circuit Court for the district of Nevada, in a local action, over water rights* IN THE CALIFORNIA PORTION OF A STREAM, *which stream rises in and flows through and out of the State of California into and through the State and district of Nevada.*

As noted in the statement of facts, the decree herein rests on the proposition that the actions commenced by petitioner in California present the same issues as were theretofore presented by the action commenced by respondent in the United States Circuit Court of Nevada (Trans., p. 7, folios 15, 16).

We desire to argue a single proposition, viz., **THAT THE ACTIONS COMMENCED BY PETITIONER IN CALIFORNIA DID NOT, AND COULD NOT, PRESENT THE SAME ISSUES AS WERE PRESENTED BY THE ACTION COMMENCED BY RESPONDENT IN NEVADA, FOR THE REASON THAT THE COURT SITTING IN NEVADA HAS NO JURISDICTION TO TRY ANY ISSUE PRESENTED IN THE CALIFORNIA ACTIONS,** or *vice versa.*

The primary propositions in support thereof are:

1. *The action in Nevada is a local action to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said United States Circuit Court, must necessarily situate exclusively within the State of Nevada, and thus the only issues presented by said action are as to respondent's title to said realty in Nevada.*

2. *The actions in California are local actions to quiet title to realty which, from the inherent limitations on the jurisdiction of the said California Court, must necessarily be situate exclusively within the State of California, and thus the only issues presented by said actions are as to petitioner's title to said realty in California.*

Wherefore, the issues presented in the California actions being as to the title to realty in California, cannot be the same issues as are presented in the Nevada actions, which are as to the title to a different realty, situate in Nevada.

It is well-settled, that a Federal court, in enjoining an action begun in a State court, does not proceed on any of the ordinary equitable grounds of relief, as that the prosecution of the action in the State court is contrary to good conscience, or involves a multiplicity of suits, etc. By virtue of the limitations of the statute, the Federal court has no jurisdiction to consider any of these questions in an action to enjoin the prosecution of an action in a State court. The power of the Federal court is limited to protecting its own jurisdiction already acquired; it being deemed an impairment of the jurisdiction of the Federal court to have the same issues and subject-matter, which have once been tendered and litigated

in said court, thereafter tendered for litigation, by the same parties, in a State court.

Sec. 720, Rev. Stats.
Bates' Fed. Eq. Pro., Sec. 541.
Buck *vs.* Colbath, 3 Wall., 334.
Fisk *vs.* Union Pac. R. R. Co., 10 Blatch., 518.
Abell *vs.* Culberson, 56 Fed., 329.
Northern Pac. Co. *vs.* Cannon, 49 Fed., 517.
Cen. Trust Co. *vs.* Western R. Co., 112 Fed., 471.
Terre Haute Co. *vs.* Peoria Co., 82 Fed., 945.

Thus, it is conceded, that the finding of fact which is the basis for the issuance of the injunction granted herein was that the actions in Mono County, California, tendered the same issues for determination as had theretofore been tendered for determination, in the Circuit Court for the district of Nevada, in the action of Miller & Lux *versus* Rickey *et al.* From this finding the legal conclusion was drawn that the prosecution of the actions in the California court conflicted with the jurisdiction theretofore acquired by the Federal court sitting in Nevada.

Was this finding of fact warranted either by the pleadings or the evidence or both?

THE PRIMARY QUESTIONS OF FACT ARE, WHAT ARE THE ISSUES THAT WERE PRESENTED BY THE ACTIONS COMMENCED RESPECTIVELY BY THE RICKEY LAND AND CATTLE COMPANY IN MONO COUNTY, CALIFORNIA, AND BY MILLER & LUX IN THE CIRCUIT COURT SITTING IN NEVADA.

These will be considered in order.

The actions commenced by the Rickey Land and Cattle Company in California were to quiet title to certain water rights in the Walker River in Mono County, California (Trans., pp. 5 and 6, folios 10-14). The subject-matters of those actions were those water rights, which were realty in

California. The only issues presented in the actions commenced by petitioner in California were as to the title to those water rights, realty in said State. On this question there has been no conflict. Neither the courts below, or counsel, have suggested that the court had, in the actions commenced by petitioner in that State, jurisdiction over any subject-matter in the State of Nevada; or that it was sought to determine any issues, as to the title to any subject-matter, located in the State of Nevada, or anywhere outside of the county of Mono, State of California; or that the subject-matter of the California suit was anything other than realty situated exclusively in Mono County, California.

The issues presented in the actions commenced by petitioners in California, being as to, and confined to, the title to certain realty, located exclusively, in Mono County, said State; *what are the issues presented, in the original action, commenced by Miller & Lux against Thomas B. Rickey, in the State of Nevada?*

Complainant, in its original bill filed against T. B. Rickey, alleged, that it was the owner by appropriation, of the right to divert certain of the waters of Walker River in the State of Nevada, for use on its lands in said State. That Thomas B. Rickey and others, without right, were diverting waters at a point higher up on said stream, and depriving complainant of the water it was entitled to divert. An injunction, restraining defendant Rickey, from further trespassing on complainant's said right, is prayed for.

Preliminary to determining what are the issues presented by the bill of complaint in this action, is the question—what is the subject-matter of this action?

We can readily determine all possible property and rights that may be the subject-matter of this action. It may be, what we will term property right number *one*, viz: The land of complainant in Nevada, or something that so inheres in complainant's said land, as to be part and parcel thereof, and have its locus therein and be indistinguishable, and insepar-

able therefrom (This view was announced by the Circuit Court in the opinion on the plea, and by the Court of Appeals in this case).

Miller & Lux *v.* Rickey, 127 Fed., 573.
Miller & Lux *v.* Rickey, 146 Fed., 573, 4
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It may be, *Two*—property right Number one, *plus*, a right appurtenant to complainant's said lands, which inheres and has its locus, in the stream of the Walker River, from the point in said stream where complainant diverts said water, up said stream, to the boundary of the State of Nevada, which is the boundary of the district of the Federal Circuit Court, sitting in Nevada—or,

It may be *Three*,—property right Number one, *plus*, a right appurtenant to complainant's said lands, which inheres in and has its locus, in the stream of the Walker River, from the point in said stream where complainant diverts its said water, up said stream through the State of Nevada to and across the boundary of the State and district of Nevada, into and through the State and district of California, to the source of said Walker River.

We will discuss these property rights in the above order, assuming each in turn to be the subject-matter of this action, and on each assumption, determine the issues that are presented by the action, *and ascertain in each case, whether the issues so disclosed, are in whole or any part, the same issues, as those that were presented by the actions commenced by petitioner, in Mono County, California.*

PROPERTY RIGHT NUMBER ONE, which both the Circuit Court and the Court of Appeals, declared in their respective opinions, to be the subject-matter of the original action commenced by complainant in the district of Nevada, consists of the lands of complainant in Nevada, or something that so inheres and has its locus in complainant's said land, as to be part and parcel thereof, and indistinguishable and inseparable therefrom.

The action was brought, to enjoin a trespass on this property. Obviously, the one basic issue there presented, was as to the ownership or title to this property of complainant in Nevada. But was this issue presented by respondents, in the actions commenced in California? Equally obviously not. The issues presented in the California actions, were as to the title to a property situate exclusively in California, whereas any issues presented as to the subject-matter described as property right Number One, were as to the title to a property, situate exclusively in Nevada. The two issues may be of a similar nature, being each as to the title to property of a similar character; but the similarity of these two properties, one located exclusively in the State of California and the other located exclusively in the State of Nevada, does not make them the same property, or the issues, as to the title to each, the same issues.

Counsel will probably argue, and it seems to have been the view of the Circuit Court and the Court of Appeals, that the acts of defendant Rickey, which injured complainant's said lands and property in Nevada, and which are sought to be enjoined in said original action, were acts in California, in conjunction with the said property rights in California, which are the subject-matter of the California actions. That the purpose and scope of the said California actions, is to establish and quiet the right of this petitioner, as the successor of said T. B. Rickey, to continue these said acts in California, which produce injury and harm onto complainant's said property in Nevada.

Let us so assume the scope and purpose of said California actions to be. To make the case as strong as possible, let us assume that petitioner, by his said actions in California, is seeking to quiet its title to a right to do, in California, acts, that work positive and affirmative injury to complainant's said property in Nevada; as for instance, to roll stones from a vantage point in the State of California, down onto complainant's lands in Nevada; or to turn waters, down from a

vantage point in the State of California, so that they flow onto and over and flood complainant's lands in Nevada; or to create noxious fumes and odors from some point in the State of California and cause the same to flow onto complainant's property in the State of Nevada, and thus injure and ruin the same for any useful purpose. Would such an action, commenced by petitioner in California, subject the petitioner to the restraint of an injunction, as interfering with the prior acquired jurisdiction of the United States Court sitting in Nevada? Manifestly not. There is a no more cardinal rule than that courts will not enjoin vain or void acts. That, as far as petitioner might, by any action instituted in the courts of California, attempt to quiet its title to a right to injure property, situate in the State of Nevada, its action would be both vain and void, is too clear to need the citation of authority. Petitioner might, in the courts of the State of California, quiet its title to roll stones or run waters or flood gases over lands in the State of California; but there are no courts sitting in the State of California, that have jurisdiction to establish any right in petitioner, to roll stones or run water, or flood gases onto lands, in the State of Nevada

Conant *vs.* Deep Creek Irr. Co., 23 Utah, 627.
Guaranty Trust Co. *vs.* Delta, etc. Co., 104 Fed., 5.
Story on Conflict of Laws, 7th edition, sec. 543.
Carpenter *vs.* Strange, 141 U. S., 87-105.
Watts *vs.* Waddle, 6 Pet., 389.
Watkins *vs.* Holman, 16 Pet., 25.
Corbett *vs.* Nutt, 10 Wall., 464.
Bates' Fed. Eq. Proc., secs. 70 and 75.

The courts of California, having no such jurisdiction, an attempted action in the courts of California, calling for the exercise of such jurisdiction, could by no possibility create a conflict with the jurisdiction of any court.

But counsel will probably reply, that the purpose of the actions instituted by petitioner in California, was not to quiet

its title to roll stones or run waters or flood gases on complainant's lands in Nevada, but to quiet its title to divert certain of the waters of Walker River in the State of California, which diversion lessened the flow of the waters of Walker River in the State of California; which as a consequence, lessened the flow of the Walker River in Nevada; which as a consequence, deprived complainant of water which it had a right to divert and use for the irrigation of its land in the State of Nevada; and that these are the very acts, which it is the purpose of complainant's original action to enjoin. Be that so, what do we there have as the subject-matters of complainant's original action? Not complainant's lands, or something inherent and inseparable from and having its locus in complainant's lands exclusively; but the right to have the water of Walker River, which petitioner is seeking to quiet its title to in California, flow down said river through the State of California into the State of Nevada, and down through the State of Nevada, to complainant's point of diversion on its lands.

This is the property right numbered *three* above, as a possible subject-matter of complainant's said action. As the consideration at this present point, is confined to the determining of the possible issues that complainant's original bill may present, having the property right above described as number *one* as its subject-matter, we will postpone any discussion of the issues that complainant's original bill, viewed as having said property number *three*, as its subject-matter, until we reach that stage of our argument.

Assuming then, that the subject-matter of the original action, commenced by complainant, in the Federal court sitting in Nevada, was complainant's lands in Nevada, or something inherent in and having its locus in said lands, existing as part and parcel thereof, we respectfully submit, that no issues that were or could have been tendered, as to this subject-matter, are, or could have been, the same issues, as were tendered, by petitioner's said actions in California.

WE COME NOW, TO A CONSIDERATION OF THE POSSIBLE ISSUES, THAT MAY HAVE BEEN TENDERED IN COMPLAINANT'S ORIGINAL ACTION, ON THE ASSUMPTION THAT COMPLAINANT'S SAID ACTION HAD, AS ITS SUBJECT-MATTER, THOSE PROPERTY RIGHTS HEREIN SET OUT AND DESIGNATED AS NUMBER TWO, viz., property right number *one*, plus a right appurtenant to complainant's said land, which inheres and has its locus in the stream of the Walker River, from the point in said stream, where complainant diverts its said water, up said stream, to the boundary of the State of Nevada, which is the boundary of the district of the Federal court sitting in Nevada.

This property right, likewise exists and has its locus, exclusively within the district and State of Nevada. The previous discussion has demonstrated, that no issues that could be tendered, as to the title to a subject-matter lying exclusively within the State and district of Nevada, are, or could be tendered, by those axions, in the court sitting in the State of California; which, it is conceded, have for their subject-matter, the title to properties situate wholly within that State.

The fact, that the object of the California actions, is to establish petitioner's right, to divert water from the Walker River within the State of California, which will have the consequent effect, of lessening the flow of water in the Walker River down through the State of California, to the boundary line between California and Nevada; which will have the further consequential effect, of lessening the flow of said river, down through the State of Nevada, relates exclusively to the consideration of property right *number three*, and does not increase any of the possible issues that may be tendered as to the title to the property rights herein designated as *number two* exclusively.

WE COME NOW, TO POSSIBLE SUBJECT-MATTER HEREINABOVE REFERRED TO, AS PROPERTY RIGHT NUMBER THREE which is, viz., property right number one, that is, a right,

having its locus in and being part and parcel of complainant's lands; plus a right or interest, appurtenant to said lands in Nevada, and inherent and located in the stream of the Walker River, from complainant's point of diversion, up said stream through the State of Nevada, to and across the boundary between Nevada and California, and through the State of California, to the source of the stream.

It is clear, that if rights inherent in the stream of the Walker River in the State of California, are a part of the subject-matter of the original action commenced by complainant in Nevada, and that complainant presented issues in said action, as to the title to said rights and interests in California; then the conclusion may be drawn that petitioner, in seeking to quiet his title to its rights in said stream in California, has presented the same issues, as were theretofore presented by complainant. *Thus the consideration, of whether rights inherent in, and having their locus in, the stream of the Walker River in California, are a part of the subject-matter of said original action, commenced by complainant against Thomas B. Rickey in Nevada, is vital in this case.*

In other words, the supreme question in this case is: DID THE UNITED STATES CIRCUIT COURT, SITTING IN THE STATE AND DISTRICT OF NEVADA, ACQUIRE, BY VIRTUE OF THE FILING OF THE BILL IN THE CASE OF MILLER & LUX VS. RICKEY, JURISDICTION, OF RIGHTS AND INTERESTS, INHERENT IN AND LOCATED IN THE STREAM OF THE WALKER RIVER, IN CALIFORNIA?

Water rights, in a natural stream are real property, and an action to enjoin a hostile diversion, is an action to enjoin a trespass on real property; or to put it more accurately, is an action to quiet and establish a title to real property, which carries with it the ancillary relief of an injunction. This rule is conceded by counsel, and was announced by the Circuit Court of Appeals in this case (Rickey L. and C. Co. *vs.*

Miller and Lux, 152 Fed., 11), and has been declared without conflict by practically every court in the land.

Union Mill, etc., Co. *vs.* Dangberg, 81 Fed., 73, and cases cited.

Wiel on Water Rights, 2d ed., § 65.

The question before this court, then, assumes this general form: HAS A CIRCUIT COURT OF THE UNITED STATES, SITTING IN ONE STATE AND DISTRICT, JURISDICTION IN THIS FORM OF AN ACTION, TO ENJOIN A TRESPASS, ON REAL ESTATE SITUATE IN ANOTHER STATE AND DISTRICT?

The distinction between local and transitory actions, exists, as much in equity as at law, and an action to enjoin a trespass on real estate, is a local action.

This proposition, was denied by counsel in the courts below, but was announced by the Circuit Court of Appeals in this case (152 Fed., 11), and is supported by all the authorities cited in the opinion, as well as by the leading case of the Northern Indiana Railway Company *vs.* The Michigan Central Railway Co., 15 Howard, 233, and by the following authorities:

Stillman *vs.* White Rock Mfg. Co., 23 Fed. Cases, 83, No. 13446.

Morris *vs.* Remington, 1 Parsons (Penn.), 387.

Bump on Fed. Prac., p. 138.

Angel on Water Courses, 7th ed., par. 418.

Enc. of Pleading and Prac., vol. 22, p. 1158.

Gould on Pleadings, p. 112.

The Company of The Mersey *vs.* Irwell Mfg. Co., 2 East, 498.

U. S. *vs.* Rio Grande Dam, 174 U. S., 690.

Bates' Federal Equity Proc., sec. 71.

U. S. *vs.* Winans, 73 Fed., p. 72.

Pomeroy, Eq., Jrsp., secs. 298 and 1318.

Miss. & Mo. R. R. Co. *vs.* Ward, 67 U. S., 485.

Lewin on Trusts, vol. 1, p. 130, star pages 48 and 49.

Norris *vs.* Chambers, 29 Beaven, 246; same, 3 De G. and F., 583.
Dicy on Conflict of Laws, p. 214.
Harrison *vs.* Harrison, Law Rep., 8 Chancery Appeals, 342.
Jenkins *vs.* Lester, 131 Mass., 355.
Bates on Fed. Eq. Proc., vol. 1, sec. 75.
Huntington *vs.* Atrol, 146 U. S., 657.
Greely *vs.* Low, 155 U. S., 58, 76.
Story's Conflict of Laws, 7th ed., sec. 543, p. 685.
Atlantic Dredging Co. *vs.* Bergnock R. R. Co., 44 Fed., 208.
People *vs.* Colo. R. R. Co., 42 Fed., 638.
Atlantic, etc., Tel. Case 46, N. Y. Superior Court, 377.
Western Union Tel. Co. *vs.* Western R. R. Co., 8 Baxter (Tenn.), 54.
Marshall *vs.* Turnbull, 34 Fed., 827.
Western Union Tel. Co. *vs.* Pacific & Atlantic Co., 49 Ill., p. 90.
Fargo *vs.* Redfield, 22 Fed., 373.
Port Royal R. R. Co. *vs.* Hammond, 58 Ga., 523.
Linsey *vs.* Silver Star Mining Co., 66 Pac., 382.
Texas, etc., R. R. Co. *vs.* Gay, 86 Texas, 571.
Guar. Trust Co. *vs.* Delta, etc., Co., 104 Fed., 5.
Balto. B. & L. Ass'n *vs.* Alderson, 90 Fed., 142.
Carpenter *vs.* Strange, 141 U. S., 87.
Farmers' Loan & Trust Co. vs. Northern Pac. R. R. Co., 69 Fed., 871.
Washburn on Easements, 3d ed., 692.
Smith's Leading Cases, p. 1034.
Enc. Pleading & Prac., vol. 14, pp. 1122 and 1106.
Gilbert *vs.* Water Power Co., 19 Ia., 319.
People *vs.* Central R. R. Co., 42 N. Y., 283.
Wood on Nuisances, 3d ed., sec. 830.
Horn *vs.* City of Buffalo, 49 Hun., 76.
Buck *vs.* Ellenbolt, 84 Ia., 394.

Section 742 of the Revised Statutes speaks of a *"suit of a local nature in law or in equity."*

With the two exceptions, immediately hereinafter noted, the jurisdiction of a Federal court, in a local action is confined exclusively to real property situate within the territorial limits of the court's judicial district. This is a fundamental rule applying to all courts.

Northern Indiana R. R. Co. *vs.* Michigan Central R. R. Co., 15 Howard, 233.
Livingston *vs.* Jefferson, 1 Brock, 203.
Fed. Case No. 8, 411.
McKenna *vs.* Fiske, 1 Howard, 241.
Massey *vs.* Watts, 6 Cranch, 148.
Conant *vs.* Deep Creek Irr. Co., 23 Utah 627; 66 Pac., 188.
Davis *vs.* Headley, 22 New Jersey Eq., 115.
Carpenter *vs.* Strange, 141 U. S., 105.
Guar. Trust Co. *vs.* Delta Co., 104 Fed., 5.
Story on Conflict of Laws, 7th ed., p. 685.
Watts *vs.* Waddle, 6 Pet., 389.
Watkins *vs.* Lessee, 16 Pet., 25.
Corbett *vs.* Nutt, 10 Wall., 464.
Boyce *vs.* Grundy, 9 Pet., 275.
Balto. Ass'n *vs.* Alderson, 90 Fed., 142.
Farmers' L. & T. Co. *vs.* Northern Pac. R. R. Co., 69 Fed., 871.
Bates' Fed. Eq. Proc., secs. 70-75.
Texas & Pac. R. R. Co. *vs.* Gay, 86 Texas, 571.
Pine *vs.* N. Y., 185 U. S., 93.
People *vs.* Central R. R. Co., 42 N. Y., 283.

One exception above referred to is expressed in the special congressional enactment, section 742, Revised Statutes, which reads:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed

> character, lies partly in one district and partly in another, WITHIN THE SAME STATE, may be brought in a circuit or district court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

In *para materia* with section 742 may be read section 738 of the Revised Statutes as amplified by section 8 of the Judiciary Act of March 3, 1875.

Section 738 of the Revised Statutes provides for substituted service of summons in suits "in equity to enforce any legal and equitable lien or claim against real or personal property within the district where the suit is brought" and provides "*but the said adjudication shall * * * affect his property within such district only.*"

Section 8 of the Judiciary Act of March 3, 1875, chapter 137, 18 Stat. L., 470, amplified the above jurisdiction by omitting the last word *only*, and including certain other claims and demands, and adding, "*And when a part of the said real or personal property * * * shall be within another district,* BUT WITHIN THE SAME STATE, *said suit may be brought in either district in said State.*"

These statutes clearly point the rule. The words "WITHIN THE SAME STATE," and, "BUT WITHIN THE SAME STATE," in these two statutes, limit the power of the court. In the case at bar, a part of the property over which it is necessary to establish the jurisdiction of the Federal Court, in the action of Miller and Lux *vs.* Rickey, is within the limits of another State, viz. California, and beyond the jurisdiction of the Courts in Nevada.

The other exception is contained in a special Act entitled "An Act to prevent unlawful occupancy of public lands," 23 Stat. L., 321. Section 2 thereof provides * * * "And jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having

jurisdiction over the locality where the land enclosed *or any part thereof shall be situated,* to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act." This special act, designed to convey a special jurisdiction; to restrain the unlawful enclosure of public lands, seems to convey a jurisdiction in any United States Court, where a part of the land shall be situated, to enjoin the fencing of all portions of the enclosure, even though some portion thereof may be in another State.

As this is neither a suit, by the Government to enjoin the unlawful occupancy of public lands, or a suit, involving a subject-matter, lying partly in one district and partly in another district, "BUT WITHIN THE SAME STATE," neither of these two exceptions apply; and it remains, that in the case of Miller and Lux *vs.* Rickey, the Federal Court sitting in Nevada had no jurisdiction over rights and interests inherent in and located in the stream of Walker River, in the State of California. Wherefore, we are compelled to lop off, as beyond the jurisdiction of the Court in Nevada, all that portion of the aforesaid possible subject matter, designated as property *number three,* described and referred to, as a right and interest, appurtenant to complainant's lands in Nevada, but inherent and located in the stream of the Walker River, where it flows exclusively in and through the State of California.

Thus pruned, we have possible subject-matter Number *three,* identical with possible subject-matter Number *two.* But with the subject-matter of the original action of Miller and Lux *vs.* Rickey, thus limited to rights located exclusively in the State of Nevada, we have already seen there remains no possibility for the presentation of the same issues as were tendered by the commencement of actions having as their subject-matter rights in realty, located exclusively within the State of California.

Counsel have not been slow to recognize the force of these facts, that drive to the foregoing conclusion. From the very outset of this litigation, counsel have met the issue squarely, with the unqualified contention, that there is no such a thing as a local action in equity—that equity acts solely *in personam* and therefore necessarily, all actions in equity are transitory. Counsel below, on the plea of Thomas B. Rickey to the jurisdiction of the Circuit Court sitting in Nevada to enjoin him from diverting water in the State of California, placed the burden of his argument on the proposition, that all actions in equity are transitory, and recognizing the flat conflict with the decision of this court in the case of the Northern Indiana Railroad Company *vs.* the Michigan Central R. R. Co., 15 Howard, 233, stated in his opening argument, that he expected to show that that case had been overruled by later decisions of this court.

Judge Hawley, in opening his opinion on the plea, said—"It may be said that the questions involved in defendant's plea cluster around the single proposition as to whether or not the suit is of a local or transitory nature" and concluded his opinion with the following language—"The jurisdiction of courts of equity over the classes of cases effecting property situate without its local jurisdiction exists only when the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction. That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction and punish him for contempt if he violates it." Miller & Lux *vs.* Rickey, 127 Fed., 576-580.

In the Northern Indiana R. R. Case it might also have been said with equal effect—"that this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction and punish him for contempt if he violates it." But this court did not so say, and could not have so said, and dismissed for lack of jurisdiction the action which only asked for the process of an injunction against a person within the jurisdiction of the court.

Assuming that the Circuit Court, in the Miller & Lux *vs.* Rickey case, held that by virtue of service of process on defendant Rickey, it had jurisdiction to enjoin him with reference to property situate beyond its jurisdiction; that case is squarely in conflict with the Northern Indiana R. R. case and all other cases cited. Assuming that it was the holding of the Circuit Court that the acts of Rickey in California were productive of injury to complainant's property in Nevada, as may be gathered from this sentence, quoted from the opinion, page 576: "The injury for which redress is sought in the bill of complaint, is an injury to complainant's land situate in the State of Nevada"—and that thus the subject-matter of the action was exclusively real property in Nevada, over which the Court has jurisdiction; then, as we have above seen, there was no room for a conflict of jurisdiction to arise from the bringing of a suit to quiet title to realty situate exclusively in California. The Rickey Land and Cattle Company could not in any court of California quiet its title to injure Miller & Lux's land in Nevada.

Judge Hawley expressly overlooked and set aside the distinguishing feature set out in the Northern Indiana R. R. case. He said, to quote further from the opinion on the plea, page 580, "The reference is these opinions to contracts, trusts or fraud, was not intended to limit the jurisdiction to such cases only."

Chief Justice Marshall, in Massey *vs.* Watts, 6 Cr., 148, after extensively citing authorities, where courts of equity had held jurisdiction of actions indirectly affecting foreign real estate, on the sole grounds of some relation of privity between the parties growing out of a contract or a trust or a fraud, in determining the jurisdiction of the Court, stated the pivotal question as follows: *"The inquiry, therefore, will be, whether this is an unmixed question of title or a case of fraud, trust or contract."*

After considering and quoting from the authorities at

length, Justice McLean, in the Northern Indiana R. R. case said, page 243:

> "The controversy before us does not arise out of a contract, nor is it connected with a trust expressed or implied,"

and therefore concluded that, as the property which the injunction was sought to protect lay outside the district, that the case was not one where

> "the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree."

The most learned text writers in our law have pointed this distinction to be the decisive question in this character of cases.

Wharton in his Conflict of Laws, 2d ed., section 288, thus states the rule:

> "In order to enable a court of equity to compel a party subject to such court to perform acts in reference to foreign real estate, there must be a *fiduciary relation* between the party on whom the decree acts and the party asking for the decree."

We quote from Lewin on Trusts, v. 1, p. 129, star pages 48-49:

> "As to land lying within a foreign jurisdiction, the court will enforce natural equities and compel the specific performance of contracts, provided the parties be within the jurisdiction and there be no insuperable obstacle to the execution of the decree."

Here follows a series of illustrations, all being cases where there existed a personal privity between the parties. The author then sums up as follows:

> "In such cases, however, the courts, according to the modern doctrine, require as a substratum for its jurisdiction that there should exist a *personal privity* between the plaintiff and the defendant."

The English Chancellors, than whom, says Judge Story, no one has gone further to extend and broaden the limits of equity jurisdiction, have held themselves bound by this rule, although in every case where the question has arisen the defendant resided or was found within the jurisdiction of the court.

The case of Norris *vs.* Chambers, 29 Beaven, 246, Cases in Chancery, is in point. The Chancellor, after citing the rule laid down by the case of Penn. *vs.* Lord Baltimore, 1 Ves. Sen., 444, and other later authorities, continued:

> "I am not disposed, however, to go a step further than these cases warrant and demand. On examining them I find that *in all of them, a privity existed between the plaintiff and the defendant.* They had EITHER ENTERED INTO SOME CONTRACT OR SOME PERSONAL OBLIGATION HAD BEEN *incurred moving directly from one to another.* In this case I cannot find that anything of that sort exists."

As the real estate was in Germany, the action was dismissed for want of jurisdiction. The case was appealed, and the Lords Justice, through Lord Chancellor Campbell, in 3 De G. & F., 583, in a strong opinion affirmed the case and recognized the rule.

HAS IT EVER BEEN CONTENDED THAT A TRESPASS CREATES A PRIVITY BETWEEN THE TRESPASSER AND THE OWNER OF THE PROPERTY?

Dicey, in his work on the Conflict of Laws, pages 214, 216, speaking of the High Courts of England, announces the rule as follows:

> *"In respect of Subject-matter.*
>
> Rule 39—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for
>
> (1) The determination of the title to, or the right

to the possession of, any immovable situate out of England, or—

(2) The recovery of damages for tre-pass to such immovable."

Here follows a long list of illustrations.

"*Exception*—The Court has jurisdiction to entertain an action against a person who is in England respecting an immovable situate out of England (foreign land) on the ground of either—

(*a*) A contract between the parties to the action.

(*b*) An equity between such parties with reference to such immovable."

See also Harrison *v.* Harrison, Law Reports, 8 Ch. Appl., 342.

Jenkins *v.* Lester, 131 Mass., 355.

Authorities making this rule determinative of a court's jurisdiction in cases of this character, might be cited in sufficient number to fill a volume. A fair list of such decisions is given in the report of citations of the case of Massey *vs.* Watts, *supra,* found in Vol. 1, Rose's Notes, to the U. S. Reports, p. 420.

The language quoted by Judge Hawley from the case of Phelps *vs.* McDonald, 99 U. S., 298, as an authority to the effect that courts of equity may, in all cases where jurisdiction of the parties may be acquired by service of process, enforces its decrees *in personam,* even though they be in reference to real property beyond the jurisdiction of the court, must be construed in the light of, and in view of the application of the quoted language to the facts of that case. Language, which is perfectly proper to express power which a court can exercise in a case where it has jurisdiction, may be entirely inapplicable to a case, where the court does not have jurisdiction. In cases where the necessary jurisdictional facts exist, the court under all the authorities can act on the parties and enforce its decree *in personam,* even though they be in reference to real or personal property beyond the terri-

torial jurisdiction of the court. But in the absence of such jurisdictional facts there is no such power.

Phelps *vs.* McDonald was a case where, under all the general principles governing courts of equity hereinabove cited, the court had jurisdiction. The action was to have it decreed that chose in action and money due under the same, *was held in trust for the plaintiff,* as assignee in insolvency. The gravamen of the suit was founded in the *fraud* of the defendant. The court, after reciting the acts of fraud, alleged to have been perpetrated by the defendant, in acquiring the chose in action from the plaintiff said:

> "Considering the sale in the light of this showing, we can not hesitate to hold it invalid" (page 305).

Phelps *vs.* McDonald was a transitory action of necessity, from the nature of its subject-matter, viz., a chose in action. It was a transitory action, further, by reason of the privity between the parties growing out of the transactions on which it was founded. Thus the court had jurisdiction of the controversy, and having jurisdiction, it had the unquestioned power to decree the relief as recited. This is in direct line with all of the authorities. The language quoted simply enumerated the powers of a court of equity already vested with jurisdiction. Any other construction renders the language a mere dictum, and foreign to any purpose in the case, and carries with it the necessary implication that this court went out of its way to pronounce on a proposition in no way before it for decision, and too, in a pure dictum, lay down a rule of jurisdiction, totally at variance to an unbroken line of decisions coming down through the centuries.

To treat the language quoted from Phelps *vs.* McDonald by Judge Hawley as a simple enumeration of the powers of a court of equity acting in a case where it has jurisdiction, is to assign to this language, a direct bearing on the case then before the court, and to read it in harmony with all

the previously decided cases. But to treat the language quoted, as a rule, giving courts of equity jurisdiction over foreign real estate in all cases where service can be had on the parties, is to charge that this court deliberately went out of its way, to, by the way of a pure dictum, reverse every decision it or any other court had rendered on this important subject.

The case of Muller *vs.* Dows, 94 U. S., 444, cited by Judge Hawley, was an action to foreclose a mortgage on a railroad, a portion of which was in another State. The court was, under all the decisions, vested with power to carry out, according to its terms, the contract of mortgage between the parties.

The case of Cole *vs.* Cunningham, 133 U. S., 137, was one, where the acts of the defendant were held to constitute a fraud on the plaintiff, and Chief Justice Fuller based the jurisdiction of the court on—

> "The authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to stay acts contrary to equity and good conscience."

We are aware, that there are three or four isolated cases in State courts, where courts of equity have overlooked the necessity of "an equitable sub-stratum between the parties" as essential to vest the court with jurisdiction, and have issued injunctions in reference to foreign real estate, in cases where there existed no privity between the parties. That in the multitude of causes pending before all the various courts in the fifty odd States constituting this Federal Union, with their various phases of facts, and the anxiety of courts to execute justice, a few such decisions should arise, which are based on an incorrect conception of the rule, is not surprising. The cases are few and isolated and the reading of any of them shows it to stand without warrant in any of the authorities therein expressly relied on; and while we are aware of the identity of these cases and of the probable intention

of counsel to cite them; we deem it unnecessary to tax the patience of this court by any more than a general reference to this inherent error existing in all these cases.

We feel that the foregoing consideration disposes of any contention, that a court of equity has jurisdiction to enjoin a pure trespass on foreign real estate, and thus can have issues tendered to it in such a case, as to title of foreign real estate by reason that such an action is transitory in its nature.

But despite all these positive rules of law and unquestioned authorities, suppose counsel should establish their contention, that the case of Miller & Lux *vs.* Rickey is a transitory action, involving issues indirectly affecting titles to rights in this stream in California; can there by any possibility be a conflict of jurisdiction created between the Federal Court in Nevada sitting in a transitory action decreeing *in personam* against T. B. Rickey in a case to use the language of Judge Hawley where "the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction," and any court in the State of California sitting in any kind of action? We respectfully submit that the rule is well settled that if the first suit "IS STRICTLY A SUIT IN PERSONAM IN WHICH NOTHING MORE THAN A PERSONAL JUDGEMENT IS SOUGHT, NO REASON IS PERCEIVED WHY A SUBSEQUENT ACTION MAY NOT BE BROUGHT AND MAINTAINED IN ANOTHER JURISDICTION, ALTHOUGH IT INVOLVES THE DETERMINATION OF THE SAME ISSUE OR ISSUES ON WHICH THE RIGHT TO RECOVER IN THE FIRST SUIT DEPENDS. THE BRINGING OF SUCH SECOND SUIT, UNDER THE CIRCUMSTANCES SUPPOSED, DOES NOT OUST THE COURT IN WHICH THE FIRST SUIT WAS INSTITUTED OF ITS JURISDICTION, OR DELAY OR OBSTRUCT IT IN THE EXERCISE OF ITS JURISDICTION OR LEAD TO THE CONFLICT OF AUTHORITY."

Merritt *vs.* American Can Co., 79 Fed., 228, 232.

Stanton *vs.* Embry, 93 U. S., 548.

B. & O. R. R. Co. *vs.* Wabash R. R. Co., 119 Fed., 678.

Thus admitting the position of counsel and the Circuit Court below, that the action of Miller & Lux *vs.* Rickey is transitory and thus wholly within the jurisdiction of the Nevada Circuit Court, it with equal necessity follows that no case has been made calling for the issuance of the injunction restraining the prosecution of the action commenced by petitioner in California on the ground that the same conflicts with the jurisdiction of the court in Nevada.

In case of failure to sustain the decree entered herein with the contention that the action of Miller & Lux *vs.* Rickey was a transitory action, *counsel in the court below advanced the further contention, that this case was one in which the courts in the States of California and Nevada have concurrent jurisdiction of the subject-matter, by reason of what counsel terms the indivisible nature of the rights involved.* We quote from the brief of counsel in the Circuit Court of Appeals.

> "The water right of complainant, then, which it seeks to protect, is, according to counsel, an *interest* in all the river above its land; including, it is true, that part of the stream in California, but equally including that part in Nevada. That right is, in its very nature, wholly indivisible; and, in such a case, the most defendant could claim would, under elementary principles, be that this suit might be brought in either State."

Thus counsel reasons, that the courts of the two States, having concurrent jurisdiction over the entire subject-matter of rights in this stream, when one court assumes this jurisdiction in an action properly commenced, it would be an infringement on its jurisdiction, for a court of the other State to, at the instance of one of the parties, or a privity of one of the parties to the original action, entertain any suit relating to rights in the stream.

As this argument, which has been termed that of the *indivisable res,* is based almost entirely on the nature of a

water right in a stream, and of complainant's water right in particular, it may well, preliminary to a close discussion of that contention, to ascertain the general nature of a water right, by assembling a few of its well-settled attributes.

The primary elements of a water right acquired by an appropriation of water from a natural stream have been defined as—

First. The right to have the water flow, unimpaired in quantity or quality, from its source, down the stream to the appropriator's point of diversion.

Second. Of the right to divert the water from the stream when it reaches its point of diversion.

Cole *vs.* Richards (Utah), 75 Pac., 376.
Black's Pomeroy on Water Rights, sec. 64.
Farnham on Waters, vol. 3, sec. 674.
Phœnix Water Co. *vs.* Fletcher, 23 Cal., 482.
Howell *vs.* Johnson, 89 Fed., 559.
Conant *vs.* Deep Creek Irr. Co., 23 Utah, 627.

Thus it is held that the right of an appropriator to have the water flow unimpaired in quantity or quality from above, down the stream to his point of diversion, while it does not consist of an actual ownership of the corpus of the particles of water flowing in the stream above, yet is a substantial right and interest in the stream which the courts will protect.

Black's Pomeroy on Water Rights, sec. 64.
Duckworth *vs.* Watsonville W. & L. Co. (Cal.), 89 Pac., 338.
Cole *vs.* Richards (Utah), 75 Pac., 376.

Thus it has been unanimously held in Nebraska, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Wyoming, and Hawaii, by all courts, that an appropriator can, at will, change his point of diversion and place of use of his water, provided only he does not by so

doing trespass on any of the rights of his neighbors to their injury.

See Weil on Water Rights, 2d edition, section 184, where fifty-four cases sustaining the rule are cited and not one *contra.*

Thus the Supreme Court of Colorado in a recent case—Seven Lakes Reservoir Co. *vs.* New Loveland, etc., Irr. & L. Co., 93, Pac. 485—involving a sale of a water right and the change of its use from irrigation on one piece of land to storage for other uses, said:

> "A priority to the use of water is a property right which is the subject of purchase and sale and its character and method of use may be changed."

A water right "is the subject of property and may be sold and conveyed."

Kinney on Irrigation, sec. 264, 5 cases.
Gould on Waters, sec. 234.
Pomeroy on Riparian Rights, sec. 58.

Not alone may the place of diversion and use of the right be changed, but the character of the use may be changed, as from irrigation to municipal purposes, or for power or storage.

Strickler *vs.* Colo. Springs, 16 Colo., 61.
City of Telluride *vs.* Davis, 33 Colo., 355.
Williams *vs.* Altnow (Ore.), 95 Pac., 200.
Wadsworth Ditch Co. *vs.* Brown, 88 Pac., 1060.
Irr. Co. *vs.* Reservoir Co., 25 Colo., 144.
Hallett *vs.* Carpenter, 86 Pac., 317.

Thus in Colorado, where the streams are divided into different water districts each of which is distinctly supervised, it has been held that the owner of a water right on a stream can change his point of diversion and user from one water district on the stream to another water district.

The court said:

> "The right to change the point of diversion or place of use of water which has been obtained as the result of an appropriation, is one of the incidents of ownership."
>
> Lower Latham Ditch Company *vs.* Bijou Irr. Company, 93 Pacific, 483.

A water right may exist independent of the ownership or possession of any land.

Wiel on Water Rights, 2d ed., § 63.

Santa Paula, etc., Works *vs.* Peralta, 113 Cal., 38.

Thus, this court has held that a water right can be owned by a corporation which owns no land.

Gutterez *vs.* Albuquerque Land Co., 188 U. S., 555.

It is customary to speak of a water right as an appurtenance to some other estate. From the foregoing established characteristics of a water right it is clear that this is not necessarily so. Thus the Supreme Court of California has said:

> "The water right is the principal thing, and if either is appurtenant to the other, the ditch is appurtenant to the water right."
>
> Jacobs *vs.* Lorenze, 98 Cal., 340.

The Federal courts have held that interests in a stream in one State may be acquired by an appropriation from the stream in another State lower down.

Howell *vs.* Johnson, 89 Fed., 559.

Morris *vs.* Bean, 123 Fed., 618.

Hoag *vs.* Eaton, 135 Fed., 411.

Anderson *vs.* Bassman, 140 Fed., 14, 20.

Finally, it has been well said:

> *"It is settled in this arid region by abundant authority, that when the waters of a natural stream have been appropriated according to law, and put to a bene-*

ficial use, the rights thus acquired carry with them an interest in the stream, from the points where the waters are diverted from the natural channel to the source from which the supply is obtained."

Cole *vs.* Richards (Utah), 75 Pac., 376.

From the foregoing citations it is clear that the owner of a water right in a natural stream, is the owner of real property that consists of an interest in the stream above him, which interest and right entitles him to divert and use from said stream at any point thereon and for any purpose or purposes he may see fit, a given amount of water. While the right may be appurtenant to real estate, it may be independent of the ownership of any real estate and is subject to purchase and sale.

Assuming, or rather conceding to complainants for the sake of this argument on the jurisdiction solely, that the interstate character of the Walker River did not in any manner limit the extent of the possible right or interest that was acquired by complainants' appropriation from the river in Nevada, complainants' rights so acquired consist—

1st. Of the right to have the water of Walker River flow, to the extent of respondents' appropriation unimpaired in quantity and quality, from its source in the State of California, down through the State of California towards respondents' point of diversion as far as the California State line.

2nd. Of the right to have the water of Walker River to the extent of respondents' appropriation flow, unimpaired in quantity or quality, from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to respondents' point of diversion.

3rd. Of the right to divert the water when it reaches the point of diversion.

Counsel's contention is that this right is one and wholly indivisible, and thus equally and wholly within each State and within the jurisdiction of the courts of both States.

Having in view the nature and character of a water right, let us assume that complainant should commence an action in a court of California to quiet its titles to its rights to use the waters of Walker River in Nevada, and having obtained its decree in a court in California establishing its title to a specific right in the waters of Walker River, should take that decree and present it to a court sitting in Nevada, as evidence of its right to divert, free from interference, certain of the waters of the Walker River in Nevada. Would the decree of the California court be admissible in evidence, in so far as it purported to determine a right in the stream in the State of Nevada—real estate in the State of Nevada? Obviously not. While the court sitting in California would have unquestioned and complete jurisdiction to determine and establish the title to a right and interest in the Walker River in the State of California, it could have no jurisdiction to determine or establish any right or interest in the stream of the Walker River or other real estate in Nevada. That is an exclusive function of courts of the State of Nevada, and wholly beyond the jurisdiction of the courts of California or any other State.

This precise point was before the courts of Colorado and Utah in the cases of

Conant *vs.* Deep Creek Irr. Co., 23 Utah, 627; 66 Pac., 118.

Lampson *vs.* Vaile, 27 Col., 201; 61 Pac., 231.

The Conant case involved rights in a stream, Curlew Creek, flowing from Idaho into Utah. In an action in Idaho, in which all parties appeared, the Idaho court entered a decree purporting to quiet the titles of the parties in the stream in Utah as well as in Idaho. Later this action was commenced in Utah, the complaint being based on the decree of the Idaho court.

The court said:

> "Did the Idaho court have jurisdiction to try and determine the title and right to the use of the water

flowing in that portion of Curlew Creek situated within Box Elder County, Utah?"

The question is conclusively answered in the negative, on the authority of Carpenter *vs.* Strange, 141 U. S., 105, and other cases hereinabove cited.

The court went on to point out that the courts of Idaho had jurisdiction to protect rights in the stream in Idaho, whether those rights in Idaho arose by virtue of a diversion from the stream in Idaho or from diversions made lower down the stream in Utah. To determine all rights in the stream in Idaho, was the exclusive function of the courts of Idaho, just as it was the exclusive function of the courts of Utah to determine all rights in the Utah portion of the stream.

From the foregoing, it is obvious that the Rickey Land & Cattle Company could not have brought an action in a court sitting in the State of Nevada, either State or Federal, to quiet its title to its water rights in the State of California.

A judgment of a Nevada court, quieting title to real property in the State of California, would be a mere nullity. Yet complainants, in the original action, are simply turning the other side of the shield to the front, and bringing an action in the State of Nevada, in an attempt to quiet their title to a water right they claim in the State of California, because they happen to also claim a water right in the stream in the State of Nevada.

The fact that respondent, by virtue of its appropriation in Nevada, happens to have a right in this stream in Nevada, as well as in California, does not amplify the jurisdiction of the Nevada court so as to enable it to adjudicate the title in California. Petitioner might change its point of diversion and move it down the stream from the State of California into the State of Nevada, and thus acquire, in addition to its right to have the water flow down the stream in California, a right to have the water flow down the stream and be di-

verted in the State of Nevada; but by so doing, petitioner could not vest the Nevada court with jurisdiction over its right to have the water flow down the stream in California. It is true that, after it changed its point of diversion down the stream and into the State of Nevada, the Nevada court could protect its right to have the water flow down the stream in the State of Nevada; but the Nevada court would have no more jurisdiction to protect the right to have the water flow down the stream in the State of California after it had changed its point of diversion into the State of Nevada, than when the point of diversion was in the State of California. *The right to have the water flow down the stream is inherent in the stream, and is where the stream is, and that part of the right that is in the California part of the stream, is exclusively in the jurisdiction of the California court, and that part of the right that is in the Nevada part of the stream, is exclusively within the jurisdiction of the Nevada court.*

Conceding, as we have, for the sake of the present argument, that the rights acquired by complainants are as great and extensive as they would have been, were the Walker River wholly an intrastate stream instead of an interstate stream; complainants' rights in the Walker River are real property, lying partly in one State and partly in another—partly in the State and district of Nevada and partly in the State and district of California.

Any construction of the law, that would vest in the Federal courts sitting in these respective States, concurrent jurisdiction over this entire property would be directly in the teeth of section 742, Revised Statutes, and section 8 of the Judiciary Act, which expressly limit the concurrent jurisdiction of United States courts over property lying partly in one district and partly in another, to property lying in districts "WITHIN THE SAME STATE." The words "WITHIN THE SAME STATE" and "BUT WITHIN THE SAME STATE" being words of positive limitation.

Take those words out of the statute, and the statute would

be broad enough to include property, lying partly in one district in one State, and partly in another district in another State, but the words "WITHIN THE SAME STATE" and the words "BUT WITHIN THE SAME STATE" place a positive and definite limitation on the jurisdiction of the court, which the courts have no power to go beyond.

Any construction that would give a court sitting in one State jurisdiction over this entire interstate property as fully as if the said property "were wholly within the district for which such court is constituted" would simply wipe out the plain words of the statute.

Counsel, with simply an abstract conception, a pure fiction, which he chose to term an *indivisible res*, a fiction referred to or described nowhere in either books or decisions, would wipe out these positive and clear words of limitation expressed in this statute, which confine the concurrent jurisdiction of courts over property lying partly within one district and partly within another, to property lying "WITHIN THE SAME STATE."

As noted above, there is no authority in law giving, and there is positive enactment of the law withholding from courts of different States, concurrent jurisdiction over the same subject-matter in a local action. There is nothing more indivisible about a stream, than there is about a piece of land, a wagon road or telegraph line, or a railroad lying partially in one State and partially in another State. It is true the particles of water usually flow one way in a stream, whereas the rights in a wagon road or telegraph line or a railroad contemplate a movement in both directions along the way. But this would render them, if anything, more indivisible. A stream flowing from British Columbia into the United States, or *vice versa,* if an *indivisible res,* would be both wholly in the United States and wholly in British Columbia.

But the question of the indivisible nature of a stream, and the concurrent jurisdiction of courts of different States

thereover, is a question, closed equally by a decision of this court and the statutes. It came before this court in the case of The Miss. & Mo. R. R. Co. *vs.* Ward, 67 U. S., 485.

The action was commenced in the United States Circuit Court for the District of Iowa, for a mandatory injunction, to enjoin the maintenance of a bridge across the Mississippi river, from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation, and thus interfered with the plaintiffs' right to navigate the stream.

It will be observed, that the boundary line dividing the States of Iowa and Illinois is the center of the Mississippi river; and thus one-half of the stream and one-half of the bridge only, were within the territorial limits of the jurisdiction of the United States Circuit Court for the District of Iowa. But if the stream is an indivisible thing, or if the courts of both States had concurrent jurisdiction, as was argued by counsel in the court below, there plainly could be no objection to the jurisdiction of the Circuit Court for the District of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois. But this court did not view either the bridge or the stream as indivisible, or the jurisdiction of the respective courts as concurrent over the entire stream. This court held that the boundary line of the State of Iowa was the limit of the Iowa court's jurisdiction, and that that court could neither inquire into, nor adjudicate, concerning rights in the stream, or the effect of the bridge on the Illinois side; although it affirmatively appeared that one of the piers on the Illinois side created in eddy that obstructed navigation on the Iowa side of the river.

The absolute and definite limitation of the power of the United States Circuit Court for the District of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect

of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

> "This is a question which we cannot examine nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal courts across the Mississippi, by enlarging the judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice cannot do it, unless authorized by act of Congress."

Mr. Justice Nelson, while dissenting from the majority opinion of the court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa, and used the following language:

> "The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court, for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court of the Iowa district cannot deal with it on the Illinois side; and for the same reason a court in the Illinois district could not, if the suit were in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for, divide a bridge, and it is

no longer a bridge; and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the court held that the stream and its eddies was as far as the jurisdiction of the court was concerned, absolutely divided by the boundary line in the center of the stream.

It has been contended, as distinguishing this case, that, this action being in the nature of one to abate a nuisance by virtue of a mandatory injunction, the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the ultimate test of a court's jurisdiction over a subject-matter—the power of the court to act on the res.*

Counsel cited in the court below the cases Lower King's River Ditch Co. *vs.* King's River & Fresno Canal Co., 60 Cal., 410, and Desert Irrigation Co. *vs.* McIntyre, 16 Utah, 398, 52 Pac., 628.

As to those actions, it suffices to say, the California constitution provides article 6, section 5, "That all actions for the recovery of the possession of or quieting the title to, or the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, *or any part thereof affected by such action is situated.*"

Section 3193 compiled laws of Utah, 1888 provides "Where real property *is situated partly in one county and partly in another,* the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action.

Under these plain provisions of the law, the courts readily and correctly held that the courts of either the upper or the lower county had jurisdiction to protect a right in a stream which had been acquired by a diversion and user in the lower county, but which has been trespassed upon in the upper county—both counties being within the same State.

In the Utah case there was a contention that the statute conflicted with the constitution; but the court held the constitutional provision sufficiently broad to authorize the statute.

The same court cited the Desert Irrigation Company case and construing these same constitutional and statutory provisions in the case of Postal Telegraph Company *vs.* Oregon S. L. Ry. Co., 23 Utah, 474, held, that a court sitting in one county had jurisdiction to condemn a right of way for a telegraph line through five counties, the line being in part in the county where court was sitting.

Would counsel have temerity to cite this case as an authority for the jurisdiction of a Federal court sitting in one State to entertain a suit to condemn a right of way over land situated in another State?

The decision of the Circuit Court of Appeals in this action, seems to have been made to turn on a definition of the nature, location and character of complainant's water right. The rea-oning of that learned court seems to be, that the water right was part and parcel of complainant's land, from which it is deduced that the suit is, "One concerning or pertaining to that realty" (Transcript, 44, folio 98). To this construction with which we do not at all agree, we have no necessary dissent; for as above pointed out, as the subject-matter of our actions is real property situate exclusively in California, we could by no possibility present the same issues, as are presented in an action having as its subject-matter, realty situated exclusively in Nevada.

This point was entirely over-looked by the court below. The reasoning of that court established in the Federal Circuit Court sitting in Nevada, jurisdiction over a certain subject matter, namely realty in Nevada, from which the court concludes that the suit, "was properly instituted in the State of Nevada (Transcript, page 44, folio 98). It is unnecessary for us to deny that the court of Nevada had jurisdiction over

all realty in Nevada. That may be admitted and as long as we do not bring any suits which have as their subject-matter realty in Nevada there can be no conflict.

From another point of view the Court of Appeals lays stress on the fact that respondent's water right is an easement appurtenant to certain lands, "realty" which lie in Nevada, and, speaking of the right of easement, says "it savors of, and is part of, the realty itself," and thus the suit is "one concerning or pertaining to that realty," from which the deduction is made that the realty to which the right is appurtenant being in Nevada, the entire right itself must be in Nevada. The conception is that an easement must of necessity have the same physical location as the land to which it is appurtenant. That this conception is obviously erroneous seems too clear for argument. Nature fixes the location of easements. They are located in the servient tenement, and thus necessarily totally exterior to the dominant tenement, to which they are appurtenant. As was said by the way of illustration by Justice Woodbury in the leading case of Stillman *vs.* The White Rock Mfg. Co., 23 Federal Cases, 83, No. 13446, in speaking of a water right in an interstate stream:

> "Thus a right of way on land in one state to a farm in another is an interest situated in the first State, and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical to their locality. Nature fixes the locality of each, and one may be in one town, county, or state, and the other as well be beyond the dividing line in another, though contiguous and a suit lie in another for the injury committed there."

See also,

Bannigan *vs.* City of Worcester, 30 Fed., 294.

By no form of specious reasoning can this right in the California portion of this stream be moved down and located within the territorial limits of the jurisdiction of the Nevada court, simply because it happened to be appurtenant to land in Nevada. That conception would be directly in conflict with the cases of

Howell *vs.* Johnson, *supra.*
Morris *vs.* Bean, *supra.*
Hoag *vs.* Eaton, *supra.*
Anderson *vs.* Bassman, *supra.*

Those were each cases brought in the courts of upper States to protect and quiet the titles to water rights in the stream in the upper State, which rights were appurtenant to land in the lower State. If water rights appurtenant to land of necessity have the same physical and territorial location as the land, then in each of those cases there was no subject-matter within the jurisdiction of the court.

It is true that the subject-matter of these actions in California and Nevada, respectively, are quite closely related, inasmuch as the flow of the stream in Nevada is dependent on the flow of the stream in California; but that dependency does not make them one and the same as above noted. This argument is simply that of the *indivisible res* approached from a slightly different point of view.

An unlawful diversion in California, may diminish respondent's rights in the stream both in California and Nevada, lessening the flow of the stream in California, and, as a consequence, lessening the flow of the stream in Nevada. Violating and injuring respondent's rights in the stream in the State of California may cause, undoubtedly, a resultant injury to respondent's rights in the stream in the State of Nevada, but that does not change the location of the rights that are directly injured by petitioner. The right of the appropriator is to have the water flow unimpaired down the stream to the point where he desires to divert it. That right exists in the stream, as an easement right up to the

source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Petitioner's diversion in California, if a trespass, is one committed on respondent's right or easement to have the water flow down the stream in California toward its point of diversion. There is the true injury, and there is where respondent must have protection, irrespective of whether it desires to divert the water from the California or the Nevada portion of the stream. If respondent can protect its rights in the stream in California, then it may receive the amount of water it is entitled to and desires to divert in the State of Nevada at the State line dividing the two States. Respondent's rights directly affected by the California action, are the rights to have the water flow unimpaired down the stream in and through the State of California toward the place where respondent may desire to divert the water, whether in California or in Nevada. For instance, suppose that respondent, instead of desiring to appropriate this water from the stream in the State of Nevada, should desire to appropriate it in the State of California; then, beyond question, its rights in the stream are in the State of California and beyond the jurisdiction of the Nevada court.

Conant *vs.* Deep Creek Irr. Co., *supra.*

Then let respondent change its point of diversion and use down the stream onto lands in the State of Nevada. By so doing, has it lost its right in the stream in the State of California? Or has it not the very same rights in the stream in the State of California that it had before it changed its place of use? We respectfully submit it has. It has lost no rights in the stream in the State of California, by changing its point of diversion and use to a point lower down on the stream and in the State of Nevada; and it can at any time change its point of diversion and use back up the stream and into the

State of California. In addition to cases hereinbefore cited, see

Hargrave *vs.* Cook, 108 Cal., 80;
Kidd *vs.* Laird, 15 Cal., 180;
Davis *vs.* Gale, 32 Cal., 26.

By changing its point of diversion and use from the State of California, to a place lower down on the stream and in the State of Nevada, respondent may acquire rights in the stream in the State of Nevada, namely, to have the water flow uninterrupted down the stream in the State of Nevada, that it did not have when it diverted all the water it was entitled to in the State of California; but the acquisition of such new right to have the water flow down the stream in the State of Nevada, that would result from the changing of its point of diversion and use from a place up the stream and in the State of California, to a place lower down and in the State of Nevada, would not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California would be there, just as much as they ever were; and any action having as its subject-matter, rights in the stream in California, might affect these rights; but the rights affected would be just as much in the State of California, in the case supposed, after the point of diversion and place of use had been transferred from the State of California down the stream into the State of Nevada, as they were prior to the change of the place of diversion and use, when both parties claimed the right to use the water in the State of California.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection; but if he desires to appropriate the water in the State of Nevada, the courts of California cannot protect his right to have the water flow down the stream in the Nevada portion of the stream. For his protection and the establishment of these latter rights he must go into the courts of Ne-

vada, which are the only courts having jurisdiction thereof.

Just as the courts of California cannot protect the appropriator's rights to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada cannot protect the appropriator's rights to have the water flow down the stream through the State of California. If it is the right to have the water flow on uninterrupted down the stream through the State of California that is involved, appellee must go to the courts of the State of California for protection; and the fact that as a result of the invasion of their rights in the stream in California, they have less water to divert from the stream in Nevada, does not change the location of the rights to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State.

The precise point under discussion was involved in the case of Stillman *vs.* White Rock Mfg. Co., 23 Fed. Cases, page 83. In this case, a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diversion, and the question of the jurisdiction of the Rhode Island court over the subject-matter of the action was put in issue. The court made it clear that the rights involved in that action were in the stream in Rhode Island; pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result consequential injury to complainant in Connecticut; but the direct injury and the rights directly involved were located in the State of Rhode Island. The court quite extensively

discussed the questions there involved in the following language:

> "Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it, to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States and different laws in some respects govern the two sides and different circuits of this court possess jurisdiction on each side no less than different State courts.
>
> "It becomes necessary, therefore, to ascertain now, *what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed this becomes almost the whole gist of the controversy.* After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream, where the right to the soil terminates; and, if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tendency in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interest in the whole stream is injured, and an action of some kind or other must lie for redress

somewhere. Ang. Water Courses, page 11, section 3, the cases there cited; Webb *vs.* Portland Mfg. Co. (Case #17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the lands and mills the plaintiffs own in Connecticut, or as affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong *The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream,* and not entirely on or to the mill and land, situated on one of the banks or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259.

"The first and direct injury, then, is to the easement and consequent right existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there. Thus, a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county, or State, and the other as well beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 *Cook*, 62.

"The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the center of the river or no interests to be protected there." (Italics ours.)

See also,

Bannigan *vs.* City of Worcester, 30 Fed., 294.

We respectfully submit, that the foregoing discussion has covered, in a substantial manner, every point raised by counsel or referred to in the opinions of the courts below. The opinion of the Circuit Court of Appeals was examined and discussed in detail in our brief in support of the petition for the writ of certiorari, which argument we will not repeat here, but for a further and more detailed discussion of the opinion of the court below, we respectfully refer to our brief in support of the writ, on file herein.

As a final clarifying thought let us suppose that Miller & Lux in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject-matter the protection of rights in the stream in the State of Nevada, and the action brought in the State of California, would have as its subject-matter, the protection of rights in the stream in the State of California. By virtue of the two actions Miller & Lux would establish and protect its entire rights in the stream, in California, as well as in Nevada; but it could not do this otherwise. By commencing an action in California, it could not protect its rights in the stream in the State of Nevada, and, likewise by commencing an action in the State of Nevada it could not protect its rights in the stream in the State of California.

TO SUSTAIN THE DECREE HEREIN, IT IS NECESSARY TO APPLY THE DOCTRINE OF LIS PENDENS. TO DO SO, THIS COURT MUST HOLD THAT THE SUBJECT-MATTER OF A LOCAL ACTION COMMENCED IN THE STATE OF NEVADA IS REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA.

The original bill herein was filed against Thomas B. Rickey, on June 10th, 1902. On August 6th, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, petitioner herein, and the actions, the prosecution of which is

here enjoined, were brought by the Rickey Land and Cattle Company. For the doctrine of *Lis Pendens* to apply, there must be a transfer of a *res* which is the subject-matter of an action pending.

Black on Judgment, section 550.
Freeman on Judgments, sections 196-197.

For the doctrine of *Lis Pendens* to apply the *res* must be within the territorial jurisdiction of the court.

Carl *vs.* Lewis Coal Co., 96 Mo., 149.
Sheldon *vs.* Johnson, 4 Sneed (Tenn.), 683.

The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company, was situate wholly in the State of California, and thus wholly outside the territorial limits of the jurisdiction of the Nevada Court, and thus the *res* transferred could not be the subject-matter of the bill filed by the respondent in that action. Yet the *res* transferred was the subject-matter of the action in the California suits; and thus it follows that there is no room for the application for the doctrine of *Lis Pendens* by which it is sought to connect petitioner herein with the original action of Miller & Lux *vs.* Rickey et al.

On the other theory of the case, namely, that the action of Miller & Lux *vs.* Rickey, is a transitory action *in personam* against Thomas B. Rickey in which to use the language of Judge Hawley on the plea "the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction," and thus within the jurisdiction of the circuit court siting in Nevada; an equally impassable obstacle exists to the maintenance of this action against the Rickey Land and Cattle Company, as the successor in interest of T. B. Rickey. Considering that action as transitory, and as having for its purpose, a decree directed against the person of Mr. Rickey, then the case can, in no way affect this petitioner as a purchaser from Mr. Rickey.

Thus Kerr on Injunctions, page 7, lays down the rule:

> "Injunction being an order directed to the person it does not run with the land."

It will be determinative as to the title of the plaintiff but not determinative as to any property of the defendant. See,

Attorney General *vs.* Birmingham, 50 L. J. Ch., 786; 17 L. R. Ch. Div., 685.

The city Board of Trustees was enjoined from polluting a stream with sewerage; the sewerage went from the river and onto the property of the complainant. Subsequently the town of Birmingham re-incorporated, and the drainage works were by deed transferred to the new corporation. It was sought to make the injunction effective against the Board of Directors of the new corporation. The court said:

> "The first observation to be made is with respect to this injunction to restrain the continuance of a tort. It is an injunction merely against the counsel, their workmen and agents, that cannot be said to run with the land. If they have sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard in such a case, of the new owner or purchaser of the land being liable to the former decree. If he continues the nuisance, or commits a fresh nuisance, you can bring an action against him, and that is all. He has nothing to do with the former proceedings, and I cannot see any ground whatever for supposing that he can be bound by that decree, nor, I believe, was such a thing ever heard of before."

Beech on Injunctions, section 3, thus lays down the rule:

> "An injunction being *in personam* should not be granted against the executors on account of acts done by the testator."
>
> Kirk *vs.* Todd, 21 L. R. Ch. Div., 487.
>
> St. Helena Water Co. *vs.* Forbes, 62 Cal., 182.

In this last case the courts speaking of the rights of an assignee said:

> "It is sufficient to say that the present plaintiff was not a party to the suit in which the injunction was awarded."

These authorities are all cases where the subject-matter was property situate within the jurisdiction of the court, whereas in our case the property transferred was in another State.

If this petitioner is and can in no way be bound as a successor in interest of T. B. Rickey by the litigation in the case of Miller & Lux *vs.* Rickey, then it clearly follows that in no action that may be prosecuted between petitioner and Miller & Lux, can the litigation pending between Miller & Lux and T. B. Rickey be in any manner affected.

The theory on which the decree herein was rendered, is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles, to an interest in a stream flowing in the State of California, the necessary ultimate result will be unseemly conflicts between courts. In California the doctrine of riparian rights in streams prevails, which doctrine is a part of the law of the State. In the State of Nevada, the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable, that their decisions will be in conflict with the decisions of the California courts, on the rights in the stream in California, and there will insue nothing but unseemly conflicts between courts.

But let the law be as we here contend; let the Nevada appropriator have recourse to the courts of Nevada to protect his rights in the stream in Nevada and to the courts of the State of California, State or Federal, to protect his rights in

the stream in the State of California, and all will be harmonious and without conflict.

To sum up—we have seen that if the action of Miller & Lux *vs.* Thos. B. Rickey be regarded as a local action, having for its subject-matter real property and presenting issues as to the title to real property, such real property must be located exclusively within the State of Nevada; and thus by no possibility could the issues presented in that action, be presented in an action commenced in the courts of the State of California, to quiet a title to property in California.

On the other hand, if we adopt the conception contended for by complainant and announced by Judge Hawley, but which we believe to be in the teeth of all the authorities, that the action of Miller & Lux *vs.* Thos. B. Rickey is a transitory action *in personam* in which the "relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction" then it becomes impossible, for another person, the Rickey Land and Cattle Company, to interfere with the jurisdiction of the said Circuit Court for the District of Nevada by any action it might commence in any court.

Wherefore we respectfully submit, that the actions commenced by petitioner in California did not, and could not present the same issues, as were tendered by the actions commenced by Miller & Lux against Thomas B. Rickey in Nevada, for the simple reason that the court sitting in Nevada had no jurisdiction to try any issue tendered in the California action or *vice versa*.

Respectfully submitted,

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FREDERIC D. McKENNEY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 4.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

against

MILLER AND LUX, RESPONDENT.

No. 5.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

against

HENRY O. WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

ADDITIONAL BRIEF FOR PETITIONER.

After further consideration of the principles announced in Kansas *vs.* Colorado, 206 U. S., 47, we deem it advisable to present this brief, in addition to the very full citation of authorities which was filed with the petitions and the briefs filed at the last term of this court.

In order to affirm the decision of the Court of Appeals herein, this court must decide that the Circuit Court of the District of Nevada, of which State defendant Rickey is a citizen, has, in a suit in equity against him, commenced by Miller and Lux, a citizen of California, jurisdiction of such a nature, *in personam*, as to authorize such Circuit Court to inquire into and determine the rights of Rickey, at the time the suit was filed, to the waters of the Walker River, in California, and to command the quantity and times of the use of such water in the State of California by the successor, by grant, of said defendant, Thomas B. Rickey.

We insist that the question here presented is primarily between the State of Nevada and the State of California, as to how much of the water of the Walker River each State has sovereign control of.

The common source of title of all who divert and use the water in California is the State of California. The common source of title of all who divert and use the water in Nevada is the State of Nevada.

There is no such thing as a prior right acquired to use the water under either State, which is prior in both. The prior rights alleged by Rickey Land and Cattle Company in California, and the prior rights of Miller and Lux in the State of Nevada, may both exist as to the water claimed by each.

As to what quantity of water this prior right of the Rickey Land and Cattle Company or the riparian right of the Rickey Land and Cattle Company, in California, attaches, so far as concerns Miller and Lux, will depend upon the determination of the other question, How much water has the State of California, as against Nevada, the right to control?

In disposing of the rights of private corporations parties to the action in Kansas *vs.* Colorado, this court said:

> "While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails, it fails also as against them."

It was also decided in this last-named case that each State "has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

Again it was said in this last-named case:

> "One cardinal rule underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet whenever, as in the case of Missouri *vs.* Illinois, 180 U. S., 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."

The authority and power of States admitted into the Union to control and dispose of the waters of the streams, announced in Kansas *vs.* Colorado, is directly at variance with the principles announced in cases of Howell *vs.* Johnson, 89 Fed., 559; Morris *vs.* Bean, 123 Fed., 618; Hoag *vs.* Eaton, 135 Fed., 411; Anderson *vs.* Bassman, 140 Fed., 14, and with certain State courts which follow them, also the decision of this case in the Court of Appeals. The underlying conception in all these cases is that because of congressional legislation concerning the waters of streams in the then Territories of the United States, and because of certain natural laws, that the sovereignty of the States carved from these Territories was a limited or qualified one as to

the waters of such streams. In this case the Court of Appeals, disregarding the rights of riparian owners, recognized by the laws of the State of California, said that the relative rights of the parties in each State were to be finally determined according to the laws of prior appropriation along the entire course of the stream. So far as the conclusions of these courts were based upon such a conception of State sovereignty, they were expressly overruled by Kansas *vs.* Colorado. At page 95 Justice Brewer, for this court, says:

> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. * * * When the States of Kansas and Colorado were admitted into the Union, they were admitted with the full powers of local sovereignty, which belonged to other States. Pollard *vs.* Hagan, *supra;* Shively *vs.* Bowlby, *supra;* Hardin *vs.* Shedd, 190 U. S., 508, 519; and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purpose of irrigation. Now, the question arises between two States, one recognizing generally the common-law rule of riparian rights, and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other."

Again on the same general subject:

> "It may determine for itself whether the common-law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. Congress cannot enforce either rule upon any State."

The cases alluded to that held a divided sovereignty following and meandering with the waters of the stream, a kind of co-ownership sovereignty, are all at variance with the principles of Kansas *vs.* Colorado.

From the decision in Kansas *vs.* Colorada, it is plain that the source of the right to divert and use the waters of streams in California is the law of the State of California; equally is the source of the right to divert and use the waters of streams in Nevada the law of Nevada. This excludes, under all circumstances, a common source of title for persons enjoying the use in the two States. California cannot rightfully bestow the use of that part of the stream which, as between California and Nevada, is within the sovereign disposition of Nevada, nor can Nevada bestow the use of water which California has a right to bestow as between California and Nevada. The policies of each State can, therefore, determine the relative rights and priorities of persons only as to such part of the stream as comes within its territory. As between the two States there can be no question of priority. The only question between them is, What part of the whole can each rightfully grant the use of? The answer to this question for California determines the rights of Nevada also, because those rights can only be to the residue.

The subject-matter of the claim to the use of water by complainant and by the Rickey Land and Cattle Co. resolves itself into a question of what are the rights of California and of Nevada to the stream.

Next approach the question of priority of the complainant as alleged. We have in California the law of riparian rights, which excludes any rights of an appropriator in the absence of a prescriptive adverse use. We also have in California, as between appropriators, the priority of right, based upon time of appropriation and use. In Nevada we have the law of appropriation and use, with priority to him who first uses and appropriates. The priority acquired under the laws of Nevada cannot be to that part of the stream which it is the sovereign right of California to bestow, nor can priority acquired under the laws of the State of California

be to that part of the water which Nevada had a right to bestow.

In this next step, concerning the inquiry into priority, we are confronted with the question of the relative rights to the stream of California and of Nevada.

Furthermore, does not the inquiry, as between Rickey, in California, and Miller and Lux, in Nevada, end by the determination of the same question, viz., what are the rights of California to bestow, thereby also determine what are the rights of Nevada to bestow?

The defendant Rickey disclaimed all rights to use or interfere with the water in Nevada and asserted his rights to a definite quantity in California. Rickey, disclaiming any right in Nevada, cannot be heard to question the claim to water by Miller and Lux in Nevada, under the laws of Nevada. The claim of Miller and Lux may exceed the entire flow of water which reaches Nevada. The fact of an excessive claim by a person under the laws of Nevada to something which Nevada never had to bestow, would not authorize a person asserting no claim under the laws of Nevada, to have the excessive claim determined. If possibly a trial were had, it would end when the water that Nevada had a right to have flow down was adjudged. It would not proceed further at the instance of one making no claim thereto, to adjudicate the claim of Miller and Lux.

The claims of persons to the use of water in California, which that State can authorize the use of, cannot be questioned by claimants to water in the same stream, under the laws of Nevada. It is immaterial to such users in Nevada who uses in California, so long as it is within the power of California to bestow the use.

Before, therefore, the Circuit Court could grant the prayer for injunction in the original action, it must determine, not what are the rights of the defendant Rickey, or any other person in California, but what are the rights of the State of California to bestow, by her laws. The inquiry under the

facts alleged, as between the defendant, T. B. Rickey, and Miller and Lux, in the original suit, is therefore one which begins and ends at a determination of the rights of Nevada and of California to the waters of the Walker River.

Here again let me call the court's attention to the peculiar nature of the question to be inquired into in the original suit. It is not that Rickey is making any use of his property in California which is injurious to health, or to comfort, or that is an offensive nuisance to be restrained because of the limitation on the use by the owners of all property, that is, to so use his own as not to interfere or destroy the use by others of their property. The use complained of by Rickey, in California, is the same identical use Miller and Lux claim the right to make in Nevada. Both uses consume the water. So that the inquiry presented to the Circuit Court, regarding the use by Rickey in California, is not as to the lawfulness of the manner of that use, but solely is addressed to the quantity used.

Certainly Miller and Lux, claiming under the State of Nevada, can make no claim against Rickey, that the State of Nevada could not have made, yet that State could only have been heard as to that part of the waters of the stream which was not within the power of California to bestow, as these were the waters in which Nevada was interested.

The question of the respective rights to the waters of the Walker River of the States of California and Nevada, if disputed by the States themselves, can be adjudicated by this court under its grant of original jurisdiction.

Kansas *vs.* Colorado, ***supra.***

These rights may be settled between the States by compact or agreement, by congressional sanction under section 10 of Article 1 of the Constitution.

Kansas *vs.* Colorado, 185 U. S., 139.

2 Story on Constitution, §§ 1402, 1403.

Has a Circuit Court of the United States jurisdiction to determine the question of the respective rights of Nevada and California to the waters of the Walker River at the instance of private litigants? That the question was of such a nature that the United States Supreme Court could determine it when the States invoked the jurisdiction of that Court, was decided in Kansas *vs.* Colorado, *supra*. The question here is can such judicial action be invoked in any court by any litigants other than a State.

A decision at the instance of private parties could not bind the States not parties to the record. The judgment, however, of the Circuit Court, if it has jurisdiction, would be final between the parties. Every body not a party to it would be free to act. If the Circuit Court has jurisdiction then the greatest confusion will result, if the States, after decision by such court, undertake to have the rights to the waters of the stream determined between them. Nor is this speculation remote. Such a condition might have been presented in Kansas *vs.* Colorado.

Will such prior decisions of the Circuit Court be persuasive to this court? Will these decisions and the physical and commercial conditions they have forced to grow up under them, be taken into consideration in finally determining the rights of the States? In Kansas *vs.* Colorado, this court gave consideration to the evidence of the material and commercial changes that had been made by the laws and decisions of the courts of the two States. By decisions of the Circuit Court directly deciding at the instance of private parties the rights of the two States, the Circuit Court would be forcing the evidence upon which the final issue was to be determined by this court.

If a decision is rendered by the Circuit Court in which it determines, at the instance of private parties, the rights of the two States to the stream, and upon a trial at the instance of the two States this court determines upon another apportionment, nothing but confusion could result.

Such a determination assumes that one State has received more and the other less than the decision between the private parties. In case the decision of this court gave more to the upper State the judgment of the Circuit Court would bind one citizen, at least, so that he could not avail himself of any part of the excess, while all others would be at liberty to do so. Let us assume that the decision of this court gives less to a State than is taken for her portion in the decision of the Circuit Court, then how is the rebating of water to be made by those who are parties to the final judgment of the Circuit Court. The final judgment of the Circuit Court cannot be made to yield to new conditions. That would be to destroy its character as a final judgment.

The considerations of expediency argue that the determination of the questions of the rights of a State to the absolute, unrestricted control and use of the waters within its boundaries cannot be litigated before any court in any proceeding at the instance of private parties, and can only be litigated in the Supreme Court of the United States at the instance of the States interested.

In Georgia *vs.* Tennessee Copper Co., 206 U. S., 337, Justice Holmes, speaking for this court, says:

> "When the States, by their union, made the forcible abatement of outside nuisances impossible to each * * * they did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests, and the alternative to force is a suit in this court."

And Chief Justice Fuller in Kansas *vs.* Colorado, 185 U. S., 139, speaking for this court, says:

> "The original jurisdiction of this court over controversies between two or more States was declared by the judiciary act of 1789 to be exclusive, *as in its nature it necessarily must be.*" (Italics ours.)

The individual rights of many private citizens to be protected by the State, not the interest of the State as the owner

of property directly affected, was the basis of the jurisdiction as stated by this court in—

Georgia *vs.* Tennessee Copper Company, 206 U. S., 337.

Missouri *vs.* Illinois, 180 U. S., —.

The door is open to have the respective rights of the States determined by this court. If the State of Nevada suffers from diversions of water in California it is the privilege of Nevada to commence a suit in the United States Supreme Court to limit such diversions.

Until the interest is of sufficient importance to warrant the State of Nevada to make the issue, can any court at the instance of private parties try it?

So long as the respective States do not dispute in the United States Supreme Court, no private party can be heard in any other court to determine the rights of the two States.

The right of the upper State to take all the water is not controlled by any laws of the stream or rights directly connected with it. In Kansas *vs.* Colorado, the scope of inquiry to determine the rights in the stream was stated by Justice Brewer:

> "We are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which, by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, *although not in the Arkansas Valley*, a benefit from water as

> great as that which would enure by keeping the flow in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed."

The very scope of inquiry as thus outlined discloses that it is of sovereign character, and the inquiry in no sense between private litigants.

How States shall exercise the powers entrusted to them as sovereignties, is a question of sovereignty not of property.

Nevada has no property rights in the streams of California. There is no qualified sovereignty in the streams of California which flow into Nevada. The sovereignty of California is as full and ample over this part of her territory as it is over any other. She may, by relation of the States of the Union, owe Nevada a duty regarding the use of the waters of this stream, not because of a divided sovereignty in California, but because a State should so compel the use of its territory as not to destroy the use of the water by the neighboring State. This is a limitation directed to its conduct as a State with reference to the use it permits of the stream. What Nevada has a right to insist upon from California is a course of conduct with reference to this particular part of the territory of the State of California. Nevada has no right to insist upon a qualified ownership of any of the territory of California, be it water or land. What must be the rule of conduct before the States act?

It being a question of sovereignty, and no dispute existing between the sovereign States, the State courts must treat all within the territory of California as belonging to California, and all within Nevada as belonging to Nevada. In such courts the lines of the States' boundaries are to conclusively determine the States' rights. Nature's laws and the advantages that each State may have from them are not to be questioned by these courts. The boundaries of the States,

as to these courts, are the fixed monuments of authority to all the waters within. Such was evidently the view of Justice Holmes when, as justice of the Supreme Court of Massachusetts, he said, in Manville Co. *vs.* Worcester, 138 Mass., 89:

> "Of course the laws of Rhode Island cannot subject Massachusetts lands to a servitude, and apart from any constitutional conditions, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes, so it might authorize any act to be done within its limits however injurious to lands or persons outside them."

If the Circuit Court of Nevada had jurisdiction *in personam*, over the defendant, T. B. Rickey, so that it could inquire into the rights to use the water in California, the decree could in no way affect the title to water in the State of California, and would, therefore, be in no manner binding upon the Rickey Land and Cattle Company, the grantee of the defendant, T. B. Rickey. The proceeding in Mono County will proceed to determine the title of the Rickey Land and Cattle Company in California, and the Circuit Court enjoin T. B. Rickey from trespassing upon the stream without conflict of jurisdiction.

The jurisdiction *in personam*, to the most liberal extent claimed by respondent would still be *in personam*. It could never affect the title outside of the jurisdiction, so as to prevent purchasers of the property from maintaining suits to quiet the title.

Fall *vs.* Eastin, 215 U. S., 1.
Watkins *vs.* Holman, 16 Peters, 25, 57.
Corbett *vs.* Nutt, 10 Wall., 464.
Carpenter *vs.* Strange, 141 U. S., 87, 105.

In Watkins *vs.* Holman, this court said:

> "A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may well enforce its decree by process

> against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom title is vested, can operate beyond the jurisdiction of the court."

In Fall *vs.* Eastin, this court, speaking by Justice McKenna, said:

> "But however plausible the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree is firmly established."

In the same case it is also stated:

> "When the subject-matter of a suit in a court of equity is within another State or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. In such case the decree is not of itself legal title, nor does it transfer the legal title. * * * On the other hand, where the suit is strictly local, the subject-matter is specific property and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the State where the subject-matter is situated. 3 Pomeroy's Equity, §§ 1317, 1318."

It is respectfuly submitted that for these reasons, in addition to those given in other briefs on file, the decision of the Circuit Court of Appeals, Ninth District, should be reversed.

JAMES F. PECK,
Solicitor for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. [redacted]4

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

MILLER & LUX, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT ON MERITS.

W. B. TREADWELL,
Solicitor for Respondent.

ALDIS B. BROWNE,
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ISAAC FROHMAN,
EDWARD F. TREADWELL,
Of Counsel.

(21,049)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 89.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

MILLER & LUX, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT ON MERITS.

We have not been favored with petitioner's brief on the merits and therefore cannot certainly know what points petitioner will rely on in the argument. As, however, counsel for petitioner filed an elaborate brief in support of the petition herein for writ of certiorari, we shall assume that such brief sets out the positions he intends to take on this argument, and we shall here attempt to reply to that brief. Accordingly, any references here made to utterances of counsel for petitioner should be taken as referring to that brief.

Statement of Facts.

The respondent, Miller & Lux, a California corporation, filed in the United States Circuit Court for the District of

Nevada a bill in equity against Thomas B. Rickey and a large number of other persons, all citizens of Nevada and residents of that district, and process of subpœna was thereupon issued and served on said Rickey, and he thereafter entered his appearance and put in a plea to the jurisdiction, which was overruled, and thereupon he answered.

By that bill it was alleged that the complainant is seized and possessed of certain lands (in the bill particularly described) in the State of Nevada, which are riparian to a certain water-course called Walker River; that at divers times therein set forth it had acquired, by appropriation and use, the right to divert certain specified quantities of the waters of said river and to use the same for the irrigation of said lands; that the defendants, including said Rickey, had diverted and were threatening to continue to divert the waters of said river above the complainant's said lands and above where the complainant diverted the same, thus preventing the complainant from irrigating said lands and damaging it, and that said diversions by the defendants were without right, but were being made under claims of right and adversely to said complainant. The prayer was for an injunction to restrain such diversions and for general relief (Rec., pp. 2-3).

The record here does not show what was said Rickey's plea to the jurisdiction, but, in paragraph III of its petition for certiorari herein (pp. 3-4) petitioner assumes to set it out, and refers therefor to the opinion in *Miller & Lux v. Rickey*, 127 Fed., 573. According to that statement that plea was, in substance, that all the diversions ever made or intended to be made by Rickey from the Walker River were made wholly in the State of California and solely for use upon certain lands in that State.

The fact is that the Walker River rises in the State of California in two branches, called the East and West Forks, which flow into the State of Nevada and there unite—the lands of Miller & Lux being on the main stream in Nevada below the junction of those forks.

After the filing of that bill and after the service of the subpœna on Rickey, and after his appearance in said suit, he conveyed to the Rickey Land and Cattle Company, a Nevada corporation (the petitioner here), all the rights owned or claimed by him to any water of Walker River. Thereafter, and while that suit was still pending, said Rickey Land and Cattle Company commenced in the Superior Court of Mono County, California, two actions against Miller & Lux and a number of other persons, by filing complaints, in which it alleged and claimed a superior right to the waters of Walker River, and alleged the existence of adverse claims thereto by Miller & Lux and other persons, and prayed for a decree quieting its title to the waters of said river as against Miller & Lux and other persons.

Thereupon Miller & Lux commenced the present suit by an original bill *ancillary* to said suit of *Miller & Lux v. Rickey*. In its said bill it alleged the foregoing matters in detail (Rec., pp. 1-7), *also* (Rec., pp. 3-4), that Rickey himself caused the organization and incorporation of the Rickey Land and Cattle Company and was the only person really interested in it or owning any of its stock, and that the other stockholders therein were merely his nominees and held their stock solely for him, *also* (Rec., p. 7) that the only rights claimed by said Rickey Land and Cattle Company in or to any water of Walker River were such rights, if any, as it had acquired by said conveyance from Rickey, and that the issues tendered by the complaints in the actions so brought by it in the State court were, so far as Miller & Lux is concerned, the same issues as those tendered by the said bill of complaint in *Miller & Lux v. Rickey*, and that the necessary effect of said actions would be to bring on said issues for trial in said *State* court and thereby defeat the jurisdiction of the United States Circuit Court in said suit of *Miller & Lux v. Rickey*, and to hinder and embarrass said circuit court in the trial of said issues and in the enforcement of any decree which it might render in said suit. The bill (Rec., p. 8) prayed an injunction against the Rickey

Land and Cattle Company restraining it from further prosecuting said actions in the State court as against Miller & Lux.

Thereupon, on the application of the complainant in said suit (Miller & Lux), the circuit court made an order (Rec., pp. 9-10) requiring the Rickey Land and Cattle Company to show cause why an injunction *pendente lite* should not issue as prayed for in said bill, and accompanied that order with a temporary restraining order.

On the hearing of that order to show cause said defendant (the petitioner) filed certain affidavits (Rec., pp. 21-28) which, as we shall show, did not controvert any material allegation of the bill, and the application was heard on the bill and affidavits.

Thereupon (Rec., pp. 28-29) an injunction *pendente lite* was issued by Judge Hawley as so prayed for, and it is from that order that the appeal herein was taken to the Circuit Court of Appeals.

On that appeal the Circuit Court of Appeals affirmed that order, and thereafter this court, by request of both parties, granted this certiorari.

The ground principally relied on by petitioner in the Circuit Court of Appeals and in this Court for a reversal of the order is that the Circuit Court for the District of Nevada had no jurisdiction of the suit of *Miller & Lux v. Rickey* as against Thomas B. Rickey.

ARGUMENT.

As we understand it, the claims of petitioner herein are three, namely: (1) That the suit of *Miller & Lux v. Rickey* was a *local* suit, and that so far as it related to diversions from the river made by Rickey in California the *locality* is in California, and that therefore no Nevada court could have jurisdiction; (2) that there is no conflict between the actions in the State court and that suit, and the issues are not the same, and that therefore the injunction should not have

been issued, and (3) that there was in that suit no such *lis pendens* as to make a decree therein binding on the petitioner here.

As to those matters we contend:

I.

That the Circuit Court had complete jurisdiction against Rickey as to all matters in the suit of *Miller & Lux v. Rickey*, because:

1. If that suit be one of a local nature its proper locality was *Nevada*, where it was brought;

2. Irrespective of the question whether an action *at law* to redress the injuries complained of in *Miller & Lux v. Rickey* would or would not be considered to be local, a court of *equity* has jurisdiction to act *in personam* against a person within its jurisdiction, even as to acts committed without the territorial jurisdiction.

II.

The issues in the actions in the State court are issues in the suit of *Miller & Lux v. Rickey*, and those actions would materially interfere with that suit and impede and embarrass the circuit court in disposing of it.

III.

The "Rickey Land and Cattle Company" is but another name for Thomas B. Rickey; and even if that be not so, it was merely a purchaser *pendente lite* of the right relied upon by Rickey in that suit, and would be bound by a judgment therein.

I.

IN THE SUIT OF MILLER & LUX *v.* RICKEY THE CIRCUIT COURT FOR THE DISTRICT OF NEVADA HAD FULL JURISDICTION OVER THE DEFENDANT RICKEY, AND JURISDICTION TO

DETERMINE WHETHER OR NOT HE HAD ANY RIGHT SUPERIOR TO MILLER & LUX IN OR TO ANY WATER OF WALKER RIVER.

1. *If that suit be one of a local nature Nevada was a proper locus, and it was properly brought there.*

Although the acts of Congress as to the jurisdiction of circuit courts are silent on the subject, counsel for petitioner contends that the common-law distinction between local and transitory actions, and the consequences of that distinction, apply equally to the courts of the United States. With some modifications not necessary to mention at this point, we think that counsel is correct in that contention. But, if that be so, it must be equally true that, if an action in one of those courts is brought in a venue which would have been the proper one at common law, the court *has* jurisdiction so far as that matter is concerned.

At common law it was a well-established rule as to actions of a local nature that where there are several facts which together are necessary to make out the cause of action, the venue may properly be laid where *either* of those facts had its technical *locus*. Such a rule is unavoidable; for where the *loci* of those several facts happen to be different the action could not be brought *anywhere* unless the rule were so.

The leading case on that subject, always followed, is *Bulwer's Case,* 7 Coke, 1. There the court said:

> "When matter in one county is depending upon a matter in another county, the plaintiff may choose in which county he will bring his action," and, "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned. I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage."

So, in *Comyn's Digest,* Tit. "Action," N. 11, it is said:

> "When an action is founded on two things in different counties, both material to the maintenance

of the action, it may be brought in the one county or the other."

In 1 *Saunders' Pleading & Evidence*, 413, it is said:

> "Where an injury has been committed in one county to real property situated in another, or whenever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either."

So, in *Scott v. Brest*, 2 T. R., 238, it was said:

> "Supposing the foundation of the action to have arisen in two counties, I think that where there are two facts which are necessary to constitute the offense, the plaintiff may *ex necessitate*, lay the venue in either."

This rule has uniformly been followed in America.

Barden v. Crocker, 10 Pick., 383.
Pilgrim v. Mellor, 1 Ill. App., 448.
Oliphant v. Smith, 3 P. & W. (Pa.), 180.
Gould, Pl., 105.

The rule is well stated and clearly illustrated in *Thayer v. Brooks*, 17 Ohio, 489, 492, wherein it appeared that plaintiff's mill was in Ohio and driven in part by a stream of water flowing from a swamp situated in Pennsylvania, and which swamp was in part upon land owned and possessed by defendant, who had cut a ditch across his farm in Pennsylvania, by which the water was diverted from plaintiff's mill. The action was in case, and in sustaining the jurisdiction of the lower court the Supreme Court of Ohio said:

> "The act was done in Pennsylvania, the injury " which was occasioned by that act was sustained in " Ohio. In such a case it is believed the suit would " well lie in either State. When an injury has been " caused by an act done in one county to land situated " in another, the venue may be had in either. Chitty, " Pl., 299, and cases referred to."

What, then, was the cause of action sued on in *Miller & Lux v. Rickey?* The complainant alleged *two property rights:* (1) the right to have flow to it in Nevada the waters of Walker River, that it might divert them for irrigation in Nevada; (2) the right to have the waters of that river flow to certain particular lands in Nevada belonging to it to irrigate those lands; *a wrongful injury,* the diversion of the waters of the river, above complainant's lands and ditches, thus preventing the water from reaching plaintiff or its lands; *and a damage,* the loss of the water generally, and particularly the drying up of the lands in Nevada, and the consequent failure of crops for want of water.

Rickey in his plea alleged that his *acts* of diversion were all committed in California, and he sought to justify them on the ground of his alleged ownership of certain riparian lands in California.

Assuming that plea to be true, we see, then, that complainant's property rights and the damage to those rights were both in Nevada, while the wrongful acts *causing* the injury were committed in California. Under the rule we have stated it therefore follows that the action might have been brought, so far as this question is concerned, either in California or Nevada, and it was therefore properly brought in Nevada.

The *land* for which complainant seeks protection is situated wholly in Nevada, and although the river in question flows in both States the *water right* which complainant claims is the right to have that water *in Nevada.* That right, as counsel admits, is property, and real property. The *property,* then, as to which complainant alleges a right, or which it seeks to protect from injury, is situated in Nevada.

The same is true as to the *injury* alleged. It consists solely in preventing the water from flowing, *in Nevada,* to the complainant's lands and ditches *in that state.*

So as to the relief sought. All that the complainant asks is that the defendant be compelled to abstain from prevent-

ing the water from flowing *in Nevada* to certain points *in Nevada*—and it therefore relates only to a matter personal to the defendant, and either having no legal *situs* or having its *situs* in Nevada.

The suit, therefore, is strictly one for injuries to real property *in Nevada*, and the universal rule is that such a suit may be brought in the courts of the State where the property is situated or where the injury is inflicted, at the option of the complainant.

Taylor v. Cole, 3 T. R., 292.
Doulson v. Matthews, 4 T. R., 503.
Livingston v. Jefferson, Fed. Cas. 8411.

The fact that the physical act which *causes* the injury is done in another State does not, for the reason above stated, affect the case. Suppose that I own a house in Nevada, near the California line, and a citizen of Nevada goes into California, sets up there a cannon, and shoots balls against the house to its injury. If I find him in Nevada, can I not sue him *there* for damages for that injury, or *there* enjoin him from continuing such acts? This case cannot be distinguished from such an one.

It is to be noticed that counsel for petitioner has not cited a single case to the contrary. He has referred to many cases as to the local jurisdiction of an action ***to abate a nuisance;*** but that question is a very different one from that here involved. Owing to the looseness and generality of the legal terms employed, the same thing may sometimes be considered in one point of view as a nuisance, and in another point of view merely as a trespass. But though that is true, it is certain that "to abate a nuisance" in this connection means to remove or destroy or disable some specific, tangible, physical thing whose situation or operation, or mere existence, causes a wrong; and those words mean nothing else. Every case cited by counsel is either avowedly or on its facts one of that kind. In such an action the venue must be in

The right of complainant is the right to divert a certain quantity of water for the irrigation of certain lands in Nevada, and the existence of that right is the only issue in that case. Where, then, is the *situs* of that right? Is it a mere floating right, with no definite location? Is it personal property following the owner, or is it real estate appurtenant to land in Nevada? The decisions show such a right to be clearly of the latter character.

> "Water-courses are either natural or artificial. Plaintiff's ditch was an artificial water-course. 'A water-course consists of bed, bank and water.' (Angell on Water-courses, sec. 4.) The right of plaintiff, as stated in its complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its water-course. Granting that plantiff does not own the *corpus* of the water until it shall enter the ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of lands, that which is affixed to land, and that which is incidental, or appurtenant to land. (Civil Code, 658.) If the water-course, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto."
>
> *Lower Kings River W. D. Co. v. Kings River & F. C. Co.*, 60 Cal., 408.

See also:

Standard v. Round Valley, 77 Cal., 399.
Hayes v. Fine, 91 Cal., 391, 398.
Last Chance, etc., Co. v. Emigrant, etc., Co., 129 Cal., 277.
Lorich Tule, etc., Co. v. King, 144 Cal., 450.
Smith v. Deuniff, 24 Mont., 25.

Accordingly the jurisdiction in a case of such a nature, in a court of the State or county *into* which the stream flows and in which the land or ditch injured is situated, has

been sustained as against one making a diversion in a State or county above in the following cases:

Willey v. Decker (Wyo.), 73 Pac., 210, 223.
Deseret Irr. Co. v. McIntyre (Utah), 52 Pac., 628.
California Development Co. v. New Liverpool Salt Co., 172 Fed. Rep., 792.

Briefly, the above-cited cases are as follows:

Willey v. Decker, supra, was an action brought in Wyoming by the claimants of certain water rights in Young's Creek, a stream rising in Montana and flowing into Wyoming. The complaint was similar to that in *Miller & Lux v. Rickey*, and the relief asked was the same. The diversions by some of the defendants were being made in Montana, the law of Montana being similar to that in California, and the law in Wyoming similar to that in Nevada. It was *held* (pp. 224-5) that the court in Wyoming had jurisdiction to restrain the diversions in Montana for the same reasons as those hereinbefore argued under the present head.

Deseret Irr. Co. v. McIntyre, supra, was a case in Utah. By the constitution of that State jurisdiction was confined to the court of the county in which the cause of action arises. The action concerned water rights in Sevier River, a stream flowing through two counties, San Pete and Millard, and was brought in the lower county, Millard, in which the plaintiffs' canals were situated, and the plaintiffs sought an injunction against diversions in the upper county, San Pete. On objection to the jurisdiction it was *held*, for the same reasons here urged, that the plaintiffs might have brought the action in either county, and the jurisdiction was therefore sustained. The decision was based upon reasons thus stated by the court (pp. 629-630):

> "If the injury be to real property, as a trespass, or waste, or the like, an action therefor will be local, and the plaintiff must declare his injury to have happened in the county and place where it did actually happen; *and if the acts which caused the injury in*

> *one county were committed in another, or if the cause of action consists of two or more material facts which arose in different counties, the value at common law may be laid in either.* [Citing authorities.] So, many actions, in which it is not sought to directly recover real property, are local at the common law, because they arise by reason of some local right or interest, or out of some local subject, such as the common-law actions of waste, trespass *quare clausum fregit,* trespass on the case for injuries to things real, *as for obstruction or diversion of ancient water-courses,* nuisances, waste, &c., to houses, lands, *water-courses,* right of way, or other real property. * * * The general doctrine at common law, no doubt, is that an action for injury to real property, as trespass, or case for nuisance, is local and must be commenced within the county or district in which the land lies. *Where, however, an act has been committed in one county or district, which caused injury to realty in another, suit may be brought in either. In such case the cause of action may be said to have arisen in either county."* [Citing authorities.]

California Development Co. v. New Liverpool Salt Co., supra, was a suit for damages originally commenced in a State court of California and thence removed into the United States Circuit Court where "the complaint was framed as a bill in equity in accordance with the practice of Federal courts" to restrain the California Development Company from so diverting the waters of the Colorado River by itself and affiliated corporations from both sides of the international boundary line to the resulting flowing of the lands and property used by complainant in its business of mining, gathering and refining salt. In an elaborate opinion containing full review of the authorities, the United States Circuit Court of Appeals sustained the jurisdiction of the circuit court saying (page 813):

> "Why may not a court restrain a party over whom
> " it has jurisdiction from injuring property within its
> " jurisdiction? How does it affect the question of

> " jurisdiction or venue to say that the party on whom
> " the court must act may find it necessary to do
> " things outside the jurisdiction of the court in order
> " to comply with the order of the court? May this not
> " often happen, and would it not happen oftener, if it
> " were determined that such an excuse was sufficient
> " to defeat the jurisdiction of the court?"

A few words may be added as to cases cited by petitioner. In his brief, counsel repeatedly cites the following cases:

Howell v. Johnson, 89 Fed., 556,
Morris v. Bean, 123 Fed., 618,
Hoge v. Eaton, 135 Fed., 411,
Anderson v. Bassman, 140 Fed., 14,

as in some way opposed to us on this point. But none of those cases is in any way in point as to the matter now under discussion. In each of them the suit was brought in the *upper* State, which would be equivalent to California in the case now under discussion, and the jurisdiction, when attacked, was sustained. But not one of them held or intimated that the suit could not have been brought in the *lower* State, as here in Nevada. At the most, then, those cases might be cited as showing that the suit of *Miller & Lux v. Rickey could have been* brought in California. It may possibly be true that we *could* have brought that suit in California, and we would have had no objection to doing so except for two reasons: (1) that, even according to the express admissions of counsel for petitioner, another suit in Nevada would also have been necessary, and (2) that we knew of no way of obtaining, in California, jurisdiction of the *person* of Thomas B. Rickey, a citizen and resident of Nevada. But evidently the cases so cited cut no figure here, and counsel cites no other cases except, as we have said, cases of suits for the abatement of a nuisance.

2. *Irrespective of the question whether an action at law to redress the injuries complained of in Miller & Lux v. Rickey would or would not be considered to be local, a court*

of equity has jurisdiction to act in personam against a person within its jurisdiction, even as to acts committed without the territorial jurisdiction.

(*a*). Petitioner's argument assumes throughout that, with regard to *local* jurisdiction, the rules in courts of equity are the same as in those of law. In that we conceive that counsel is wholly mistaken.

The jurisdiction in equity was at first solely *in personam,* and at that time the only requirement as to jurisdiction was the ability to serve the defendant with process of subpœna within the territorial limits of the court. Later, various remedies *in rem* or *quasi in rem* were introduced, and for that reason it became necessary to formulate a rule applicable to such cases. That rule is that the court cannot by its decree act upon, or by its process reach, *property* not within its territorial limits; but otherwise the rule remains as before. Thus, a court of equity having jurisdiction of the *person* of a defendant may compel him to execute a conveyance of property in another country, but it cannot render a decree which will directly pass the title to that property or issue process to seize it. In order to determine what the defendant must do *within the country of the court,* it may consider his rights to property out of that country, or his liabilities arising in another country, and may, by process *against his person,* compel *him* to do or refrain from doing what the rights or liabilities so determined require; but it cannot act directly upon that property, and its decree will not affect the title to it. In fact it may be stated generally that nothing but jurisdiction of the *person* of a defendant is necessary to sustain the right of any court of equity to grant an *injunction,* upon a sufficient equity, even if that equity relates to property abroad, or even if the act forbidden is to be done abroad.

A leading case, very like the one here under discussion, is that of *Great Falls Mfg. Co. v. Worster,* 23 N. H., 462. That suit was brought in New Hampshire by one who had, and

claimed the right to maintain, a dam across a river, one end of which dam was in New Hampshire and one in Maine. The dam was used to supply water to mills in New Hampshire. The defendant, by virtue of his ownership of certain lands in Maine overflowed by the dam, claimed the right to destroy the end of the dam in Maine, and threatened to do so. It was held, on the grounds we have stated, that the New Hampshire court had jurisdiction of a suit to enjoin him from so doing. The opinion of that highly learned court in that case supports that doctrine by an unanswerable citation of authorities. That doctrine has uniformly been followed by the State courts in this country.

Schmaltz v. York Mfg. Co., 204 Pa. St., 1.
Alexander v. Folleston Club, 110 Ill., 65.
Williams v. Ayrault, 31 Barb., 364.
Manley v. Carter (Kans.), 52 Pac., 915.
Willey v. St. Charles Hotel Co. (La.), 28 So., 187.
Clad v. Paist, 181 Pa. St., 148.

It is also expressly declared in the following:

Story, Eq. Jur., §§ 743, 744, 899, 900.
1 *High on Injunctions*, §§ 103-107, 803.
Gage v. Riverside Trust Co., 86 Fed., 984, 988.
Remer v. McKay, 54 Fed., 432, 434.

But nowhere has that doctrine been more emphatically and uniformly declared than by this court.

Massie v. Watts, 6 Cr., 148.
Muller v. Dows, 94 U. S., 444, 448.
Phelps v. McDonald, 99 U. S., 298, 308.
Cole v. Cunningham, 133 U. S., 107.
Moran v. Sturges, 154 U. S., 286.
Dull v. Blackman, 169 U. S., 243.
Fall v. Easton, Oct. Term, 1909, No. 24, 215, U. S., Part I, p. 1.

Those cases settle the rule that, although a court is not competent to act directly upon real property in another country, or to render a decree operating directly on the title to that property, nevertheless it *is* competent to act upon the person and conscience of a defendant within its territorial jurisdiction, and to require him to act or refrain from acting, as to that property, in a manner contrary to equity.

Counsel for petitioner contends that this rule is *limited* by the language in *Massie v. Watts, supra,* that this rule applies "in a case of fraud, of trust, or of contract." But those words were evidently not used as words of limitation or as meaning that the rule could not apply in any other case, and the reason there given for the rule is equally applicable to many other cases, and certainly to such a case as is here under consideration. But in the later cases of *Phelps v. McDonald, supra,* and *Dull v. Blackman, supra,* the court stated the rule without any such qualification and in language clearly implying that no such qualification exists. Thus, in *Phelps v. McDonald,* the court stated the rule thus:

> "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ,* which he could do voluntarily, to give full effect to the decree against him.
>
> "Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.*"

Counsel for petitioner cites the case of *Northern Indiana R. Co. v. Mich. Cent. R. Co.,* 15 How., 233, as in opposition to this rule. If there is anything in that case inconsistent with the rule contended for by us it is necessarily contrary to the later decisions of this court above cited.

Counsel also cites the case of *Miss., &c., R. Co. v. Ward,* 67 U. S., 485. But that case was expressly one *to abate a nuisance,* and the remedy there sought was therefore not *in personam,* and that case is therefore not in point.

Even, then, if counsel were correct in stating that the *res* of this controvery is in California that fact would not impair the jurisdiction of the Nevada court; for the remedy there sought is only an injunction against Rickey, to be enforced solely by process against his *person,* and no decree is asked as to any property, or the title to any property, in California.

(*b*) There is another consideration here which points in the same direction. Not only has the Nevada court jurisdiction of the person of Rickey, but he is, in fact, a citizen and resident of that State and subject to its laws, and the property which he is alleged to be injuring is property in that State. Those laws forbid him to injure that property in that manner. Can it be said that the courts of Nevada have no power to compel a citizen of that State to obey its laws, or that he can defend himself in those courts by showing that he went out of the State to break its laws, and committed his infractions elsewhere? The contrary was expressly held in the above-cited case of *Great Falls Mfg. Co. v. Worster,* 23 N. H., 462, and we submit that the law must necessarily be so. The power of a State to enforce obedience to its laws certainly extends to all its citizens, as well when they are abroad as when they are at home. In *The Apollon,* 9 Wheat., 362, 370, Mr. Justice Story said: "The laws of no nation can "justly extend beyond its own territories, *except so far as* "*regards its own citizens.*" Of course if such a citizen while in a foreign State does there an act *required* by the law of the latter State, it may be that the former State could not—it certainly should not—punish him therefor; but that is not this case. We submit that if there were no other ground the jurisdiction of the Nevada court could be sustained on this one.

1 *Bishop New Crim. Law,* §§ 121, 110.
State v. Lord, 16 N. H., 357.

Com. v. Smith, 11 Allen, 243, 259.
Kinney v. Com., 30 Gratt., 858.
Ex parte Kinney, Fed. Cas., 7825, p. 607.
Brook v. Brook, 9 H. L. Cas., 193.
Story, Conflict of Laws, §§ 21-22.

See also:
Cole v. Cunningham, 133 U. S., 107, 119.

Before leaving this point it will be well to refer to a position taken by petitioner with regard to it. Its counsel calls *Miller & Lux v. Rickey* a suit to *quiet title,* and he refers to the fact that the Circuit Court of Appeals, in its opinion in this case (pages 43, 44), so designates it. The matter is probably not important, but we desire to respectfully express our entire dissent from that view.

A suit to quiet title is one where a decree is prayed as to the title; and there is nothing of the kind in the case in question. That is merely a suit to enjoin the commission of a tort, and no quieting of title or other adjudication as to title is asked. The mere fact that the bill alleges complainant's title is of no importance. It is a part of the complainant's *cause* of suit that it owns the property which the defendants are alleged to be injuring; but the same would be the case in an ordinary action of trespass or trespass on the case. To call such a suit one to quiet title is to sweep away all distinctions with regard to actions and remedies.

While therefore we contend that the action of *Miller & Lux v. Rickey* was not a suit to quiet title to the complainant's property, still if the action had been brought in that form and expressly for the purpose of quieting the complainant's title, it has been held that the courts of Nevada would have jurisdiction although the defendant diverted the water in California for the irrigation of land in that state.

Taylor vs. Hulett (Idaho), 97 Pac., 37; 19 L. R. A. N. S., 535.

II.

THE ISSUES IN THE ACTIONS BROUGHT BY PETITIONER IN THE STATE COURT ARE ISSUES IN THE SUIT OF MILLER & LUX V. RICKEY; AND THOSE ACTIONS WOULD MATERIALLY INTERFERE WITH THAT SUIT, AND IMPEDE AND EMBARRASS THE CIRCUIT COURT IN DISPOSING OF IT.

The doctrine that the court which first obtains jurisdiction of the *res* in controversy is entitled to dispose of the controversy without interference from another court, and that it may enjoin a party from meanwhile commencing or prosecuting, against the other parties, a suit with relation thereto in any other court, is well settled, and if the later suit raises any issue which exists in the first suit its prosecution will be enjoined so far as it relates to that issue.

Prout v. Starr, 188 U. S., 537.
Pitt v. Rodgers, 104 Fed., 387.
Riverdale Cotton Mills v. Alabama, &c., Co., 11 Fed., 431.
Home Ins. Co. v. Virginia, &c., Co., 109 Fed., 681.
State Trust Co. v. Kansas City, &c., Co., 110 Fed., 10.
Central Trust Co. v. Western, &c., Co., 112 Fed., 471.
Mercantile, &c., Co. v. Roanoke, &c., Co., 109 Fed., 3.
Stewart v. Wisconsin Cent. R. Co., 117 Fed., 782.
Starr v. Chicago, &c., Co., 110 Fed., 3.

The facts in this case are well within the decisions in those cases.

Counsel for petitioner does not dispute that general rule, but he contends that the issues in the suits in the State court are wholly different from those in *Miller & Lux v. Rickey*, and that they cannot interfere with the action of the circuit court in that suit.

As against the defendant Rickey, the main issue tendered by the bill in *Miller & Lux v. Rickey* is that the complainant

owns the right to have the waters of Walker River flow from their source down to its lands and ditches in Nevada, that Rickey has no right to prevent them from so flowing, and that he is making and threatening to continue to make diversions from said river above the complainant's lands and ditches, which diversions do prevent the water from reaching complainant, to its injury.

In its actions in the State court, the petitioner alleges (pages 4-5, 6-7) that it has the right to divert, in California, practically all the water of said river, and that *Miller & Lux* claim some right, title, or interest in and to said water adverse to petitioner, which claim is without right and subordinate and subject to said alleged right of petitioner.

In the suit in the circuit court Miller & Lux pray that Rickey be enjoined from making the diversions complained of, and, in the actions in the State court, petitioner prays that it be adjudged that it is the owner of the right claimed by it, that it be adjudged that Miller & Lux has no right, title, interest, claim, or estate in said water, and that Miller & Lux be adjudged to be estopped to claim or assert against petitioner any right, title, claim, interest, or estate in or to said waters.

The bare statement of these different claims and issues is obviously sufficient to show that they conflict with each other.

We are not sure that we understand the position of counsel on this subject. As to his general argument: It may be true that no judgment in the State court *can* interfere with the decree of the circuit court, *when that shall be rendered*, for the latter court first acquired jurisdiction of the controversy (*Sharon v. Sharon*, 84 Cal., 424). But, in the meantime, Miller & Lux are entitled to the protection of the circuit court against being compelled to go and try the same issues in another court, and even to obey, *pro tempore*, a judgment of the latter court, should that be first rendered. Indeed there are even some authorities which hold that in such case the judgment of the State court might effectually

be pleaded as *res judicata* in the suit in the circuit court. While we do not agree with that doctrine we certainly should not be compelled to take that risk. The circuit court, having first acquired jurisdiction of that controversy, has possession of it and is entitled to retain exclusive possession of it at all times to the end, no matter what shapes it may assume.

As we have said, an examination of the pleadings in these different cases immediately shows, beyond question, that the issues in them *are* the same. The State court *cannot* render judgment in favor of the petitioner as prayed for in the actions before it without deciding that petitioner has the right to prevent the water of Walker River from reaching Miller & Lux in Nevada.

In his argument on this subject, counsel largely relies on the same grounds taken by him with respect to the question of *jurisdiction*. Of course, we need not follow him as to that. If the circuit court has no jurisdiction that, of course, is an end of this case, but if it *has* such jurisdiction the only question is whether the *res* or issue in both cases is the same, or in part the same.

Counsel seeks to predicate an argument on the fact that the actions in the State court are suits to quiet title, a relief which, he says, the petitioner could in no way obtain in *Miller & Lux v. Rickey*. Even if that were true, it would not affect this case. The identity of the *res* or issues, or some of them, in the suits in different courts, and not the identity of the relief sought, is the test, and the only test, of the right to an injunction in this class of cases. If in the orderly prosecution of the suit last brought it may become necessary for the court to *decide* some issue which exists in the suit first brought, then injunction will lie to forbid the party from *trying that issue* in the suit last brought, and that, irrespective of the *use* which he desires to make of such decision.

In that particular, petitioner would be in no worse position than every defendant must be whenever any suit is

brought against him. If it had chosen to sue Miller & Lux before that suit was begun, it might have elected its own forum, kind of action, or relief. But when it has once been sued it cannot be allowed to go into some other court and give that court jurisdiction over the same *res*, or try, in that court, any issue in the suit so brought against it. Thus, one in possession of land may, before ejectment brought against him, maintain a suit to quiet his title against an adverse claimant, but after ejectment *has* been brought, he cannot bring, in some other court, a suit to quiet title *to the same land*, against that plaintiff in ejectment.

But counsel's premise is not correct. What is a decree quieting title? It is merely a judicial declaration that the party has the right which he claims. It can be enforced only by pleading it, in some other suit, as *evidence*. Exactly that relief is available to any defendant in *Miller & Lux v. Rickey*. In that case Rickey may answer the bill, as, in fact, he has done, by confessing the diversions complained of and justifying them by an alleged superior right in himself. The court, in that case, would then have to determine whether Rickey has or has not such superior right and, if it decides that he has, that decision may be put in evidence, in any other case, as an estoppel, with the same effect as a decree expressly quieting his title. Petitioner then could have obtained, in the suit of *Miller & Lux v. Rickey*, all the relief it needs.

In each of these suits the *res* is the water of Walker River and in the actions brought by petitioner in the State court it prays, among other things, that it be adjudged that Miller & Lux is estopped to claim or assert against it any right or interest in any water of Walker River in California. In view of the fact, repeatedly admitted by counsel for petitioner, that the lower proprietor has an interest in the water of the stream *to its source*, a judgment such as is so prayed for would effectually nullify any effort of Miller & Lux to obtain any decree in its favor in the suit brought by it in the circuit court. In the face of such a prayer it is idle for

petitioner to assert that it is not seeking to interfere with the suit of *Miller & Lux v. Rickey*. The necessary result of the actions so brought by it is to entirely supplant the prior suit and to remove the forum in which the contest must be litigated to the State court.

III.

THE "RICKEY LAND AND CATTLE COMPANY" IS BUT ANOTHER NAME FOR THOMAS B. RICKEY; AND EVEN IF THAT BE NOT SO, IT WAS MERELY A PURCHASER PENDENTE LITE OF THE INTEREST AND CLAIM OF RICKEY TO THE RES INVOLVED IN THE SUIT, AND THEREFORE BOUND BY THE DOCTRINE OF LIS PENDENS.

(*a*) As we have said, the bill in this case alleged (Rec., pp. 3-4) that Rickey is the only person really interested in the corporation petitioner, or really owning any of the stock thereof, and that the other persons in said corporation are merely his nominees and hold their stock solely for him. If that be true, the petitioner is a *privy* with the defendant Rickey and bound by the suit to the same extent as he is.

On that subject, however, petitioner filed three affidavits, the material portions of which are as follows:

The affidavit of Thomas B. Rickey says (pages 23-24):

> "That Charles Rickey is now, and ever since the organization of said corporation has been the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company; and that Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey, became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all

times since the organization of said corporation, have been, in the absolute control of said stock, free from any right by interference, management, or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey, and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive, and have received, all the profits earned by said stock so owned and held by them for their own use, benefit and enjoyment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and said Alice B. Rickey is about forty thousand dollars."

The affidavit of Charles Rickey says (page 26):

"That he is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

"That Thomas B. Rickey does not own, nor has he at any time owned, any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey."

The affidavit of Alice B. Rickey says (page 27):

> "That she is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation, owned and held in her own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.
>
> "That Thomas B. Rickey does not own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in her own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey."

It is obvious that those statements are not such explicit denials of any matter alleged in the bill as could avail defendant on this motion.

It is not alleged in either of those affidavits that either Alice B. Rickey or Charles Rickey gave any valuable consideration for the stock so alleged to be owned by them, or what proportion that stock bears to the whole stock of the corporation. For all that there appears, it may be—and we have the right to assume—that they are respectively the wife and son of Thomas B. Rickey, that he made them a *gift* of those shares, and that those shares represent only a very small fraction of the capital stock of the corporation. Those we believe to be the facts, and, at any rate, it was for petitioner to show the contrary, if it could.

Under such circumstances the court below had discretion to issue the injunction. Counsel does not dispute the *prin-*

ciple on which we rely, and, as to the *facts,* the court below had the right, in view of the evasive nature of the statements of those affidavits, to decide, as it did decide, that there is an obvious probability that we will succeed, on the hearing, in proving the truth of the allegations of our bill—which is a sufficient ground for the granting of an *interlocutory* injunction.

(*b*) In the court below counsel sought to rely on that portion of the affidavit of Thomas B. Rickey (page 23) which reads as follows:

> "But the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey are not the same rights to water and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said lands by Thomas B. Rickey, and said water rights and the right to the use of water to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusive and peaceably."

But it is obvious that since it is not denied that the only rights which the Rickey Land and Cattle Company claims to be *prior* to those of Miller & Lux were derived solely from the conveyance from Thomas B. Rickey, and as appropriations made by it *since* the commencement of the suit of *Miller & Lux v. Rickey* are necessarily subject to that suit, that portion of that affidavit does not avail to traverse the allegations of our bill. In every point of view, then, it is clear that the

Rickey Land and Cattle Company, for all the purposes of this suit, stands merely in the shoes of Thomas B. Rickey, and will be bound by what binds him.

(*c*) That a purchaser *pendente lite* is bound by a decree in equity in a Federal court, to the same extent as if he had been expressly made a party, is elementary law.

Mellen v. Moline, &c., Works, 131 U. S., 352, 370.
1 *Freeman on Judgments,* §§ 191, 193.

See also:

Majors v. Cowell, 51 Cal., 478.

Counsel for petitioner, while not disputing this rule, seeks to limit its application to cases affecting property within the local jurisdiction of the court and described in the bill.

It is not necessary for us to consider whether or not counsel has correctly stated the rule; for this case is fully within the most extreme rule for which he contends.

As we have indicated in Point I, the subject-matter of the suit of *Miller & Lux v. Rickey* is *property* which, if it has a local *situs* at all, has that *situs* in Nevada. The *res* with which it is concerned is the water of Walker River. Whatever interest *any one* has in that stream is merely a usufructuary right, which he holds *in common* with every other person having any interest. No one has any ownership in the *corpus* of the water while it continues to run in the channel of the stream. His interest, *at the most,* is the right to have the stream flow *to* him and the right to take from it some portion, ascertained or unascertained, of its water. Persons having such rights are, in the strictest sense, tenants in common in the entire stream. The object of the suit in question is to protect the right of the complainant to the water. The right of the complainant, as alleged in its bill, is to have that stream flow to its land *in Nevada,* undiminished in quantity by any unlawful diversion *above* those lands, and to take from the stream, *in Nevada,* certain portions of its waters. The bill is therefore one as to property which is in Nevada

The doctrine of *lis pendens*, therefore, applies to the suit in question, even if that doctrine be limited as counsel claims.

Counsel's error is in supposing that the rights of the Rickey Land and Cattle Company sought to be protected by its actions in the State court consist in its *lands* in California, which, of course, are not described in our bill and are not, in themselves, within the local jurisdiction of any court in Nevada. But it is clear that the *res* in those actions is the same as that in our suit, namely, the *water* of Walker River. If that corporation has the right which it claims in those actions it is, in essence, the right to divert so much of the water of that river as to prevent Miller & Lux from receiving, *in Nevada*, the water it is there entitled to receive. The claim which it makes is therefore a claim to the very property involved in our suit; and, that claim being based upon a conveyance made to it, *pendente lite*, by a defendant in that suit, it took subject to that suit, and is to be treated now just as if it were formally a party to that suit.

(*d*) But the propriety of the injunction against the Rickey Land and Cattle Company may be justified on much broader grounds than the doctrine of *lis pendens*. It must be admitted that if an injunction would have been proper against Rickey, if he had instituted the suit, it is proper against any one who would be bound by a judgment against Rickey. While it is true that equity acts *in personam*, still an injunction will often be binding upon any person or corporation claiming under the defendant. If the grantee claims under the same right as the defendant, he will be bound by an injunction against his grantor.

High on Injunctions, sec. 1548.

Ahlers v. Thomas, 24 Nevada, 407; 56 Pac., 93; 77 Am. S. R., 820.

Wimpey v. Phinizy, 68 Ga., 188.

Bate Refrigerating Co. v. Gillett, 30 Fed., 685.

Mayor v. N. Y. & Staten Island Ferry Co., 64 N. Y., 622.

The case of *Ahlers v. Thomas, supra,* is a good illustration of this rule. In that case the defendant had been enjoined from diverting water from a certain stream. He afterwards conveyed his rights in the stream to another party, who attempted to divert the water, and it was held that the grantee was bound by the injunction. So if the Nevada court had proceeded to judgment and enjoined Rickey from diverting water that injunction would have been binding upon his grantee, the Rickey Land and Cattle Company. Especially would this be true where the formation of the corporation was a clear subterfuge to avoid the effect of the judgment (*Mayor v. N. Y. & Staten Island Ferry Co., supra*).

We therefore submit that the decree of the circuit court was correct, and that the Circuit Court of Appeals was right in affirming it.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

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RICKEY LAND & CATTLE COMPANY, PETITIONER,

vs.

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ADDITIONAL BRIEF FOR RESPONDENTS.

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In view of the argument in these cases at the last term of this court we are now able to fully understand the relative positions taken by the parties to the controversy, and also the points on which the court is most likely to desire all the light possible in reaching a determination therein. In view of the

wide general interest involved in the cases we feel that the court will welcome such further presentation of the cases as the parties are now able to make, and the result of such further research as the patries have made since the prior argument in the cases, and for that reason we have filed this additional brief covering somewhat more in detail the original briefs filed in the cases, and also presenting certain questions in the cases in slightly different aspects.

The cases in a general way present three main questions:

First. What are the relative rights of riparian owners and appropriators on streams passing through two or more States?

Second. What tribunals have jurisdiction to determine such rights?

Third. Where one tribunal, having jurisdiction to determine such rights, has acquired jurisdiction of the rights of particular parties by the institution of a proper suit and the service of process, may it enjoin such parties from interfering with its jurisdiction by invoking the jurisdiction of some other tribunal having concurrent or partial jurisdiction over the same subject-matter?

These three main questions include many minor questions, some of which are, and some of which are not necessarily involved in these cases, and in presenting this case we shall limit the discussion to the questions which we deem to be necessary to the determination of these cases, leaving other questions to be considered when they arise.

I.

PROPERTY RIGHTS IN A WATERCOURSE, WHETHER THEY BE SAID TO BE ACQUIRED FROM THE FEDERAL GOVERNMENT BY VIRTUE OF THE GRANT OF PUBLIC LANDS, OF BY VIRTUE OF THE RECOGNITION BY THE FEDERAL GOVERNMENT OF THE RIGHT TO APPROPRIATE THE SAME, OR FROM THE STATE IN WHICH THE RIGHTS ARE CLAIMED, EXTEND THROUGH THE ENTIRE COURSE OF THE RIVER AND EXIST IRRESPECTIVE OF POLITICAL LINES.

This rule we believe to be now so well established by all courts that a reference to the following authorities will be sufficient:

Kansas vs. Colorado, 206 U. S., 46.
United States vs. Rio Grande Irrigation Co., 174 U. S., 690, 703, 704.
Rundle vs. Delaware & R. Canal, 1 Wall., Jr., 275, Fed. Case 12139 (affirmed without reference to this point 14 How., 80; 14 L. Ed., 335).
Howell vs. Johnson, 89 Fed., 556.
Morris vs. Bean, 123 Fed., 618.
Hoge vs. Eaton, 135 Fed., 411.
Anderson vs. Bassman, 140 Fed., 14.

One of the earliest cases in which this question arose was the case of *Rundle vs. Delaware & R. Canal, supra,* and in a note to the very elaborate report of that case will be found an opinion by Mr. Richard Stockton, in which it is stated in reference to a stream separating two States:

> "Then may not either State appropriate the waters washing her own shores to public improvements? And what is the just limitation of the right if it exists? These questions depend upon the received law of nations—the only rule of action between independent States, and upon a just application of its

> principles to the subject before us. The most approved writers of the law of nations consider the property in a river belonging to two States as absolute in each to its own half part—and content themselves with laying down the limitations to such absolute property, which rightfully arise out of the common claim to the waters of the river—and these limitations are made to depend upon that great principle of justice adopted by all codes of law that each must so use his own right as not to destroy or materially injure the right of the other."

In the case of *Hoge vs. Eaton, supra,* the court used the following language in regard to a stream running through two States:

> "The idea of an exclusive right of the people of a State to divert its running waters to the injury of riparian owners in another State must be equally untenable. Indeed the doctrine of riparian ownership and use of running water is not subject to political boundaries. Between hostile States the doctrine may not be recognized, but any such repudiation would be simply *vis major.* Between States dwelling in peace and concord, as are the States of our Union, the equal right of the inhabitants of each State to the waters of interstate streams must alway be recognized. Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of men, other than the mighty barriers which the Creator has made on the face of the earth."

Starting with this premise, it may be urged that the two States may adopt different rules governing the distribution and use of the waters of the stream. In other words, according to the strict rules of the common law, the stream would flow through both States practically without diminution and no very serious question could arise as to the rights of various parties thereto, but in the arid States of the West such a condition is recognized by all to be inapplicable and in

all a beneficial use of the water is permitted. In some States the right to this beneficial use is held to be in the owners of the land, which by nature is made riparian to the stream. In other States it is held to belong to the public generally, and by license of the State any person is permitted by what is termed "appropriation" to make a beneficial application of the water in such State. But it should be always borne in mind that, whether the right is held to belong to the owners of the riparian lands or to belong to the public, any laws adopted by the State or enunciated and enforced by the courts thereof are only in relation to the use of such title as the State may have to the water, in view of the like right of other States through which the stream may flow. Keeping in view this fact, it is easy to see why the courts have not permitted diverse legislation, or diverse judicial decisions in the various States, to in any way affect the principle of the common ownership of the two States in an interstate stream. Thus in the case of *United States vs. Rio Grande Irrigation Company, supra*, the court used the following language on this subject:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * *
>
> "While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion, a State may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. * * *
>
> "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the Government property."

In the case of *Anderson vs. Bassman, supra,* the court used the following language, which is directly applicable to the situation in the cases at bar:

> "It follows from these authorities and others that might be cited that whether the water is taken from the stream in California by the riparian owner for the purpose of irrigation, or is taken from the stream in Nevada by the appropriator for the same purpose, the right is equally sanctioned by law and is subject to the same limitations; that is to say, the right to use the water from the stream for irrigation purposes in either State under either right, must be a reasonable use, to be determined by the circumstances of each case and with due regard to the rights of others having the same beneficial use in the waters of the stream."

The question was probably considered more carefully than in any other case by this court in the case of *Kansas vs. Colorado, supra,* where it is said:

> "Now the question arises between two States, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for, or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States, or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several States. * * *
>
> * * * * * * *

"What is the common law? Kent says (vol. 1, p. 471):

"'The common law includes those principles, usages, and rules of action applicable to the Government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.'

"As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. * * *

* * * * * * *

"One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri *vs.* Illinois, *supra*, the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations

of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purpose of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

* * * * * * *

"This changes in some respects the scope of our inquiry. It is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective States, and so adjust the dispute upon the

basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream."

II.

WHERE WATER IS WRONGFULLY DIVERTED IN ONE STATE (NECESSARILY THE UPPER STATE) TO THE INJURY OF LAND ENTITLED TO THE WATER IN ANOTHER STATE (NECESSARILY THE LOWER STATE), THE COURTS OF EITHER STATE HAVE JURISDICTION TO GRANT RELIEF, AND IN THE EXERCISE OF SUCH JURISDICTION TO DETERMINE THE RELATIVE RIGHTS OF THE PARTIES TO DIVERT WATER FROM THE STREAM IN EITHER STATE.

While it is claimed, and may possibly be true, that this precise question has never been definitely passed upon by this court, still, as this court has frequently remarked, the principles of the common law are sufficiently elastic to be readily applied to new conditions which modern invention is constantly creating, and in this particular case the most ancient and well-established rules of the common law may be invoked and applied as automatically as if they had been framed with this precise question in view.

Before taking up, however, the rules on this subject it might be well to refer to the argument made by the petitioner to the effect that if it be held that the courts of the State of Nevada may enjoin a diversion of water in the State of California, then a court in Louisiana might enjoin the diversion of water from the Missouri river in the State of Montana. This, of course, presents a very picturesque argument, but legal principles can hardly be tested by strained and unlikely applications, for those principles must necessarily be based on something more rational and enduring than mere distance. It might be argued with equal force that if it should be held that the courts of Nevada could *not* enjoin the diver-

sion of water in the State of California to the injury of land in the State of Nevada, then it would follow that they could not enjoin the discharge of dynamite in California within a foot of the line of the State of Nevada to the injury of a building in the State of Nevada and within a foot of the State of California. The truth of the matter is that the same principle which would permit a court in the State of Nevada to punish for murder a person who, in the State of California, discharged a gun, killing a person in the State of Nevada, is applied by the courts to a person who, in the State of California, sends through the United States mail a poisoned box of candy, causing the death of a person in the State of Delaware. (See *People vs. Botkin*, 9 Cal. App., 244; 22 U. S. Sup. Ct. Rep., 939.) The same rule which is applied where territorial distance is slight is applied where the territorial distance is great. Eliminating, then, this argument as adding nothing to the merits of the controversy, the rule of venue and jurisdiction at common law on this subject is plain, simple, direct, and universal, and that rule is that where an injury consists of an act committed in one jurisdiction to the damage of property situated in another jurisdiction the courts of either jurisdiction may grant relief.

Bulwer's case, 7 Coke, 1.
Comyn's Digest, Tit. "Action," N. 11.
1 *Saunders' Pleading and Evidence*, 413.
Scott vs. Brest, 2 T. R., 238.
Barden vs. Crocker, 10 Pick., 383.
Pilgrim vs. Mellor, 1 Ill. App. 448.
Oliphant vs. Smith, 3 P. & W. (Pa.), 180.
Gould on Pleading, 105.
Taylor vs. Cole, 3 T. R., 292.
Doulson vs. Mathews, 4 T. R., 503.
Livingston vs. Jefferson, Fed. Cas., 8411.

This rule has been uniformly applied to actions for the wrongful diversion of water in one county to the injury of land situated in another county.

> "It may sometimes be a question as to what is the proper county in which to bring an action for the diversion of water, where the residence of the parties, or their respective properties, are in different counties. In this connection it should be noted that the cause of action for an interference with a water right acquired by prior appropriation, by the unlawful diversion of the water, consists not only in the wrongful diversion of the water, but also in the consequent injury to the prior appropriator. Neither the diversion alone nor the injury alone is sufficient to constitute a cause of action against the person diverting the water. The mere diversion of water gives the prior appropriator no right to complain so long as he receives all the water to which he is entitled. Likewise as to the injury, unless it be shown that it was caused by the diversion in question. The diversion of the water and the consequent injury constitute one cause of action. From this it follows that the cause of action may arise in two different counties, as where the defendant in one county diverts water to which the plaintiff is entitled for the irrigation of his land lying in another county. In such case the plaintiff may elect in which county he will bring his action. Similarly, where the plaintiff's irrigating ditch is located in two counties—the head of the ditch lying in one county, and the land to be irrigated lying in the other county—a cause of action for diverting the water from the stream above the head of the plaintiff's ditch arises in both counties, and the action for such diversion may therefore be brought in either county."
>
> *Long on Irrigation*, sec. 109, pp. 207, 208.

This rule from the nature of things was first laid down and developed in connection with actions of a local nature where the property injured was situated in one *county* and the act complained of done in another *county*. The question early arose, however, as to the applicability of the rule

where the property was situated in one country or State and the act complained of was done in an adjoining country or State. One of the earliest cases in which the matter arose was the case of *Rundle vs. Delaware & R. Canal*, 1 *Wall.* Jur., 275; Fed. Cas 12139, decided by Mr. Justice Grier on circuit and affirmed without particular reference to this point by this court in 14 How., 80; 14 Law. Ed., 335. In that case an action was brought in the State of New Jersey for injuries done to real estate situated in Pennsylvania by a canal situated in New Jersey. After stating the general rule of the common law as to the venue in actions for acts done in one county causing injury in another, the court said:

> "It has been objected to the application of this doctrine to the present case that it refers to counties which adjoin, and not to sovereign States. This is a distinction, it is true, between the cases cited and the present, but we have heard no reason given why it should make a difference. Actions may be maintained in the courts of New Jersey by a Pennsylvanian to recover a debt or damage for a personal injury; and why not for injury to real property? The answer must be because the action is local and not transitory. The difficulty is caused not by any principles of international law, but by the common law, which is the same in both States. By the common law then, it must be solved. The objection is founded not on the plaintiff's right to a remedy, but on the mode of trial; and is, after all, but an objection to the venire. But I have shown that the venire is well laid in New Jersey (which as regards this court forms one county), because the nuisance complained of was created in that State. If, then, the action be local and this its proper venue, what is the value of the distinction? The plea to the jurisdiction must therefore be overruled."

CASES HOLDING THAT COURTS OF A LOWER STATE HAVE JURISDICTION OF ACTS COMMITTED ON INTERSTATE STREAM IN UPPER STATE.

The case of *Rundle vs. Delaware & R. Canal, supra,* it will be remembered, was in reference to an interstate stream separating two independent States, but the question soon arose with reference to interstate streams running through two States and it has been universally held that the courts of the lower State have jurisdiction to enjoin a diversion in the upper State to the injury of rights in the lower State. The following cases leave little to be said on this subject:

Thayer vs. Brooks, 17 Ohio, 487.

Deseret Irrigation Co. vs. McIntyre (Utah), 52 Pac., 628.

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Willey vs. Decker (Wyo.), [redacted] Pac., 210.

Taylor vs. Hewlett (Idaho), 97 Pac., 37; 19 L. R. A., N. S., 535.

California Development Co. vs. New Liverpool Salt Co., 172 Fed., 792.

Smith vs. Southern Railway Co. (Ky.), 123 S. W., 678.

In the case of *Thayer vs. Brooks, supra,* it appeared that plaintiff's mill was in Ohio and driven in part by a stream of water flowing from a swamp situated in Pennsylvania, and which swamp was in part upon land owned and possessed by defendant, who had cut a ditch across his farm in Pennsylvania by which the water was diverted from plaintiff's mill. The action was in case, and in sustaining the jurisdiction of the lower court the Supreme Court of Ohio said:

> "The act was done in Pennsylvania; the injury which was occasioned by that act was sustained in Ohio. In such a case it is believed the suit would well lie in either State. When an injury has been

> caused by an act done in one county to land situated in another, the venue may be had in either. Chitty, Pl., 299, and cases referred to."

Deseret Irrigation Co. vs. McIntyre, supra, was a case in Utah. By the constitution of that State jurisdiction was confined to the court of the county in which the cause of action arose. The action concerned water rights in Sevier River, a stream flowing through two counties, San Pete and Millard, and was brought in the lower county, Millard, in which the plaintiffs' canals were situated, and the plaintiffs sought an injunction against diversions in the upper county, San Pete. On objection to the jurisdiction it was held, for the same reasons here urged, that the plaintiffs might have brought the action in either county, and the jurisdiction was therefore sustained. The decision was based upon reasons thus stated by the court (pp. 629-630):

> "If the injury be to real property, as a trespass, or waste, or the like, an action therefor will be local, and the plaintiff must declare his injury to have happened in the county and place where it did actually happen; *and if the acts which caused the injury in one county were committed in another, or if the cause of action consists of two or more material facts which arose in different counties, the venue at common law may be laid in either.* (Citing authorities.) So, many actions, in which it is not sought to directly recover real property, are local at the common law, because they arise by reason of some local right or interest, or out of some local subject, such as the common-law actions of waste, trespass *quare clausum fregit*, trespass on the case for injuries to things real, *as for obstruction or diversion of ancient watercourses*, nuisances, waste, &c., to houses, lands, *watercourses*, right of way, or other real property. * * * The general doctrine at common law, no doubt, is that an action for injury to real property, as trespass, or case for nuisance, is local and must be commenced within the county or district in which the land lies. *Where, however, an act has been committed in one*

county or district, which caused injury to realty in another, suit may be brought in either. In such case the cause of action may be said to have arisen in either county." (Citing authorities.)

Willey vs. Decker, supra, was an action brought in Wyoming by the claimants of certain water rights in Young's Creek, a stream rising in Montana and flowing into Wyoming. The complaint was similar to that in Miller & Lux *vs.* Rickey, and the relief asked was the same. The diversions by some of the defendants were being made in Montana, the law of Montana being similar to that in California, and the law in Wyoming similar to that in Nevada. It was held (pp. 224-5) that the court in Wyoming had jurisdiction to restrain the diversions in Montana for the same reasons as those hereinbefore argued under the present head.

Taylor vs. Hewlett was in the form of an action to quiet title to water appropriated in the State of Idaho as against parties claiming water from the stream in the State of Wyoming. It was held that the courts of Idaho had jurisdiction, and that in ascertaining and determining the rights of the plaintiff within the State of Idaho the court might ascertain and determine the rights of parties higher up the stream and in the State of Wyoming, and that such judgment would be binding upon persons claiming rights in the State of Wyoming and entitled to full faith and credit in the courts of the latter State.

California Development Co. vs. New Liverpool Salt Co., supra, was a suit for damages originally commenced in a State court of California and thence removed into the United States Circuit Court, where "the complaint was framed as a bill in equity in accordance with the practice of Federal courts" to restrain the California Development Company from so diverting the waters of the Colorado River by itself and affiliated corporations from both sides of the international boundary line to the resulting flowing of the lands

and property used by complainant in its business of mining, gathering and refining salt in the State of California. In an elaborate opinion containing full review of the authorities the United States Circuit Court of Appeals sustained the jurisdiction of the Circuit Court, saying (page 813):

> "Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

A petition for writ of certiorari in that case was denied by this court (215 U. S., 603).

The latest case on the subject is the case of *Smith vs. Southern Railway Company, supra,* which was an action brought in the State of Kentucky to recover damages to a house situated in Tennessee caused by an explosion of dynamite in the State of Kentucky. After fully reviewing the authorities on the subject the court held that under such circumstances the action might be brought in either State, at the option of the plaintiff.

CASES HOLDING THAT COURTS OF THE UPPER STATE AT THE SUIT OF A PARTY INJURED IN THE LOWER STATE MAY GRANT THE NECESSARY RELIEF.

While the counsel for petitioner stoutly maintain that the stream is to be automatically cut in two at the State line, and that all rights in the stream in one State must be determined by the courts of that State and claims to see an absurdity in courts in Nevada determining the rights of parties in the State of California, they seem to see no difficulty in the

courts of California determining rights in the State of Nevada for the purpose of protecting those rights against invasion in the State of California. In fact, in order to maintain the position that the courts of Nevada have no jurisdiction of the case at bar, counsel are forced to cite with approval cases that hold that under identical circumstances the courts of California would not only have jurisdiction, but in the exercise of that jurisdiction would determine not only the rights of the defendants in the State of California, but would determine and protect the rights of the plaintiffs in the State of Nevada. These cases, to our mind, are diametrically opposed to the entire argument made by the petitioner.

The cases holding this doctrine, which is in entire accord with the doctrine contended for by us, are as follows:

Stillman vs. White Rock Mfg. Co., 3 Wood & M., 538, Fed. Cas., 13446.

Bannigan vs. Worcester, 30 Fed., 392.

Ducktown Sulphur, etc., Co. vs. Barnes (Tenn.), 60 S. W., 593, 606.

Howell vs. Johnson, 89 Fed., 556.

Morris vs. Bean, 123 Fed., 618.

Hoge vs. Eaton, 135 Fed., 411.

Anderson vs. Bassman, 140 Fed., 14.

Before leaving this subject it might be wise to make one further remark in regard to the closing paragraph of petitioner's brief (pages 50 to 51) where it is stated:

> "If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decisions will be in conflict with the decisions of the California courts, on the rights in a stream in California, and there will ensue nothing but unseemly conflicts between courts."
>
> "But let the law be as we here contend; let the Nevada appropriator have recourse to the courts of

> Nevada to protect his rights in the stream in Nevada and to the courts of the State of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict."

This picture of strife and conflict on one side and peace and harmony on the other sounds very plausible in theory, but it will not stand a practical test, for in order that the State of California at the suit of a person claiming rights in the State of Nevada may grant the desired relief it must first determine and judge the rights of the plaintiff in the State of Nevada. If the rights claimed by the plaintiff are the rights of a riparian owner it may hold that such rights are entirely ineffectual as against an appropriator or riparian owner in the State of California, and the same conflict which petitioner appears to be so solicitous to avoid would be as inevitable as if the matter were determined by the courts of the State of Nevada. If the State of Nevada and the State of California were hostile, independent nations, having no tribunal other than the tribunal of force to determine their respective rights, there would necessarily be conflict over those rights, and so, where under our system the courts of two States have concurrent jurisdiction to determine the same matter, there may be different conclusions reached in different cases by the courts of the different States, but the matter is not improved by permitting the courts of the different States to reach contrary decisions, not only on the same general question, but on the same controversy between the same parties, and as we shall hereafter show, under our system that can only be avoided by permitting the court which first acquires jurisdiction of the subject-matter to retain that jurisdiction to the end, and then, so far as the parties to that litigation are concerned, there can be no conflict of jurisdiction or decision.

Remarks on Cases Relied Upon by Petitioner.

Petitioner refers to very few authorities which it relies upon as laying down any rule opposed to the rule laid down in the many cases relied upon by us, and the few cases to which it does refer can readily be shown to be in entire accord with those cases.

One of the cases principally relied upon is the case of *Stillman vs. White Rock Mfg. Company*, 3 Wood & M., 538, Fed. Cas., 13, 446. The only thing decided in that case was that an action might be maintained in Rhode Island to abate a nuisance, namely a canal situated therein, which caused injury to lands in Connecticut. The court did not hold that an action could not be maintained elsewhere, but simply that that particular remedy could not be enforced in a suit brought elsewhere. This is the language of the court:

> "Yet here *this remedy* must be sought in Rhode Island, or it would be of no use. The canal is situated there, which is made to divert the water. The owners of the canal, the supposed wrongdoers reside there and an injunction issuing in another State or circuit could not be executed there, it being a proceeding quasi *in rem*."

The court, however, showed that a different *form* of action might be maintained in the other State, saying:

> "I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two States, though sometimes in different forms, at least, as here. Such is the case of theft continued from one State to another, or the felonious intent indicated in both, or a burglary in one State being a larceny in another, where the property was removed, but no house broken into. So if one fires a gun in one State which kills an individual in another State, there may be the offense of using a deadly weapon in the first State, and committing murder by the killing in the second

State. Again, there is sometimes an election in which to prosecute. Thus, if a blow be given in one county, and death follows in another, an appeal of murder lies in either. Dyer, 40; 4 Coke, 426; 7 Coke, 59. If two acts are necessary to constitute an offense, and one is done in one county, and one in another, the prosecution may be in either. So if "A" in one county injure land in another. *Bulwer's Case,* 7 Coke, 57; 3 Leon, 143; *Scott vs. Brest,* 2 Durn. & E. (Term R.), 238; *Mayor, etc., of London vs. Cole,* 7 Durn. & E. (Term R.), 583; 1 Chit. Pl., 299. So if one in the State of Ohio draw a bill to defraud and send it to New York by another, and thus commit or complete the fraud there, he can be punished there. *People vs. Adams,* 3 Denio, 190. And to remove all doubt by a reference to a case almost identical with this in principle:

> 'If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 Hen. IV, c. 8, or I may bring it in Middlesex, for there I have the damage.'

7 Coke, 60. It is rather remarkable, however, that a charge of witchcraft in one county of a person residing in another, created some embarrassment in Massachusetts at the close of the seventeenth century. 2 Hutch. Hist., 50. But the very case of a nuisance in one county to land in another is referred to in 7 Coke, 63, where a writ is said to lie in the former. So in Co. Litt., 154*a;* Fitzh. Nat. Brev., 183*k*."

Another case relied upon by petitioner is *Conant vs. Deep Creek Curlew Valley Irrigation Company,* 23 Utah, 627. That case was in the form of a suit brought in the State of Idaho to quiet title of the plaintiff to water in the State of Utah. The court held that such an action could not be maintained for the reason that the relief sought acted directly upon the title to the property and not merely *in personam* against the defendant. The following language of

the opinion will show that there is nothing in the case contrary to the cases relied upon by us:

> "It is insisted on behalf of the respondents that, if this court should hold that the Idaho court was without jurisdiction to enter the decree here sued on, then the Utah parties would have no court to resort to that could protect their property rights, and that the Idaho settlers could with impunity divert the waters from this stream in Idaho, and the Utah parties would be remediless. With this contention we cannot agree. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and if the settlers higher up on the stream, in another State, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter State will protect the first settler in his rights. *Howell vs. Johnson* (C. C.), 89 Fed., 556. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto; and by the decree entered in the suit in the district court of Oneida county, Idaho, such rights were fully protected, and may be enforced by proper proceedings in that court. But this rule of law cannot be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this State, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this State, and in so far as the decree of the Idaho court attempted to determine and quiet the title to such waters, it was a nullity, and could not form a foundation for this suit."

Another case relied upon by petitioner is *Lampson vs. Vaile*, 27 Colo., 201; 61 Pac., 231. That was an action, or more properly a special proceeding, brought in the State of Colorado under a special statute authorizing the formation of water districts in the State of Colorado and the determination of water rights in such district, and it was held simply upon the construction of that particular statute that it did not authorize the court to determine water rights situated entirely in the Territory of New Mexico. No question of general jurisprudence was discussed, but the decision was based entirely upon the peculiar language of the statute conferring jurisdiction on the court.

Another case relied upon is *Ducktown Sulphur, etc., Company vs. Barnes*, 60 S. W., 593. All that was held in that case was that an action to abate a nuisance, namely, a smelter situated in the State of Tennessee, might be maintained in that State at the suit of persons owning land damaged thereby and situated in the State of Georgia. Even if that case could be construed as holding that the action could not be maintained in the State of Tennessee, that is based entirely upon the peculiar relief asked, namely, the abatement of the nuisance. Relief, if granted in the State of Georgia, could not be enforced, and a court of equity will not put itself in the position of rendering a decree which it is impotent to enforce.

It will therefore be seen that so far as these cases can at all be held to decide that the particular actions involved therein could only be brought in the State where the act complained of was done, that was on account of the peculiar form of relief which was sought, namely, the actual abatement of a particular nuisance situated in such State; and without determining the correctness of those decisions it is obvious that they have no application to a case where such relief is not asked for. In other words, as pointed out by the Court of Appeals in the case of *California Development Company vs. New Liverpool Salt Company* (172 Fed., 792),

the jurisdiction of the court in an action simply for damages and an injunction cannot be affected by the fact "that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court."

Another case relied upon by petitioner, not only in this connection, but in connection with other points in the case, is *Northern Indiana Railway Company vs. Michigan Central Railway Company*, 15 How., 233. That was a suit in equity brought in the United States Circuit Court for the district of Michigan, to enjoin the defendant railroad from entering upon or using the lands of the complainant in the State of Indiana, and from hindering the complainant from completing and operating its road in that State. It will be noted that the complainant had no property right of any kind in the State in which the suit was commenced, and that the entire subject-matter of the suit was situated in another State, nor was there any equity of any kind existing between the parties requiring equitable interference, except the necessity of equitable relief on account of the inadequacy of the remedy at law. Such a case is so foreign to the questions in the case at bar that it would be presumptuous for us to argue the correctness or exact meaning and effect of that decision. In the case at bar the subject-matter of the action is the Walker river. The complainant and the defendants at most are tenants in common of that river. The largest part of the river itself is situated entirely within the State of Nevada. The lands of the complainant which are washed by the waters of that river are situated in the State of Nevada and the water claimed by the complainant was appropriated and diverted in that State and applied to beneficial use upon lands situated entirely therein, so that there is no possible analogy between that case and the *Northern Indiana Railway* case where none of the property or property rights involved was situated in the State where the action was commenced, and where the case would have

been governed by the same principles if it had been commenced in Oregon, New Mexico, or in a foreign country.

The last case relied upon by petitioner is the case of *Mississippi, etc., vs. Ward,* 2 Black, 485. That was in the nature of a proceeding *in rem* commenced in the United States District Court for the State of Iowa against a bridge situated partly in the State of Iowa and partly in the State of Illinois, for the purpose of having the bridge removed and abated as a nuisance. In denying the jurisdiction of the court to remove the bridge, so far as it was situated in the State of Illinois, the court placed its decision on the same ground as the Stillman case, namely, that on account of the peculiar remedy sought, and since the court had no power to enforce a decree granting such remedy, it had no jurisdiction.

These are all of the cases relied upon by petitioner and it is plain to see that none of them deny jurisdiction in a case like the case at bar, and none of them are in any way contrary to the cases relied upon by us.

III.

1. WHERE TWO COURTS HAVE CONCURRENT JURISDICTION THE FIRST COURT WHICH ACQUIRES JURISDICTION OF THE SUBJECT-MATTER IN CONTROVERSY WILL RETAIN THAT JURISDICTION TO THE END AND MAY ENJOIN THE PARTIES FROM PROSECUTING ANY OTHER SUIT IN ANY OTHER TRIBUNAL INVOLVING THE SAME ISSUES.

The doctrine that the court which first obtains jurisdiction of the *res* in controversy is entitled to dispose of the controversy without interference from another court, and that it may enjoin a party from meanwhile commencing or prosecuting against the other parties a suit with relation thereto in any other court, is well settled, and if the later suit raises

any issue which exists in the first suit its prosecution will be enjoined so far as it relates to that issue.

Prout vs. Starr, 188 U. S., 537.
Pitts vs. Rodgers, 104 Fed., 387.
Riverdale Cotton Mills vs. Alabama &c. Co., 111 Fed., 431.
Home Ins. Co. vs. Virginia &c. Co., 109 Fed., 681.
State Trust Co. vs. Kansas City &c. Co., 110 Fed., 10.
Central Trust Co. vs. Western &c. Co., 112 Fed., 471.
Mercantile &c. Co. v. Roanoke &c. Co., 109 Fed., 3.
Stewart vs. Wisconsin Cent. R. Co., 117 Fed., 782.
Starr vs. Chicago &c. Co., 110 Fed., 3.
Gage vs. Riverside Trust Co., 86 Fed., 984, 988.

2. SECTION 720 OF THE REVISED STATUTES DOES NOT PREVENT A COURT OF THE UNITED STATES WHICH HAS ACQUIRED JURISDICTION OF A PARTICULAR CONTROVERSY FROM ENJOINING THE PARTIES THERETO FROM PROSECUTING A SUBSEQUENT ACTION IN RELATION THERETO IN THE COURTS OF A STATE.

> "Where a State court and a court of the United States may each take jurisdiction the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan vs. Lucas*, 10 Pet., 400; *Taylor vs. Carryl*, 20 How., 584; 15 L. Ed., 1028; *Troutman's Case*, 4 Zabr., 634; *Ex parte Jenkins*, 2 Am. Law. Reg. 144. It is indeed a principle of *universal jurisprudence* that when jurisdiction has attached to *person or thing* it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."
>
> *Taylor vs. Taintor*, 16 Wall., 370.

French vs. Hay, 22 Wall., 253:

In this case a suit in equity had been brought in a State court to set aside a sale, for rents and profits, and to recover

possession of the property. A personal judgment was rendered for $2,387.66. Thereafter the suit was removed to the United States Circuit Court and the judgment set aside. In the meantime the plaintiff in the original case brought a suit on this judgment in the State court. The defendant thereupon filed an auxiliary bill in the circuit court to enjoin the enforcement of this judgment. The injunction was granted and this was affirmed on appeal, the court saying:

> "The court having jurisdiction *in personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. *Watts vs. Waddle*, 6 Pet., 391; *Lewis vs. Darling*, 16 How., 1. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive and could not be trenched upon by any other tribunal. *Hagan vs. Lucas*, 10 Pet., 400; *Taylor vs. Carryl*, 20 How., 583 (61 U. S., XV, 1928); *Freeman vs. Howe*, 24 How., 450 (65 U. S., XVI, 749); *Taylor vs. Taintor*, 16 Wall., 370 (83 U. S., XXI, 290).
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> * * * * * * *
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> "The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

Dietsch vs. Huidekoper, 103 U. S., 494:

In this case after a case at law was removed into the Federal court the State court proceeded to judgment and a suit was thereupon brought in the State court on the replevin bond. Thereupon a bill in equity was filed to enjoin the

prosecution of such suit. The injunction was granted and sustained, the court saying:

> "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."

Ex parte Sawyer, 124 U. S., 200:

> "The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*"

Freeman vs. Howe, 24 How., 450:

> "A bill filed on the equity side of the Circuit Court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under *mesne* or final process, is not an original suit, but auxiliary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

Hardraker vs. Wadley, 172 U. S., 148:

> "When a State court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted."

The court cited with apparent approval the following cases:

French vs. Hay, 22 Wall., 253;
Dietsch vs. Huidekoper, 103 U. S., 494;
Re Sawyer, 124 U. S., 200;
York vs. Pilkington, 2 Atk., 302,

and approved the view that section 720 of the Revised Statutes is subject to section 716 as construed in the cases above referred to.

3. WHERE A COURT OF EQUITY HAS ACQUIRED JURISDICTION BY REASON OF ITS JURISDICTION OVER PROPERTY WITHIN THE TERRITORIAL JURISDICTION OF THE COURT, OR BY REASON OF ITS JURISDICTION OF PARTIES RESIDING WITHIN ITS JURISDICTION AND AGAINST WHOM AN EQUITABLE CAUSE OF ACTION EXISTS, GROWING OUT OF FRAUD, TRUST, CONTRACT, OR OTHER BASIS OF EQUITABLE JURISDICTION, IT MAY RETAIN JURISDICTION AND GIVE COMPLETE RELIEF, ALTHOUGH IT MAY BE NECESSARY IN SO DOING TO PASS UPON RIGHTS TO PROPERTY SITUATED IN ANOTHER STATE OR COUNTRY.

This rule has been established and followed in a great variety of cases, of which the following are conspicuous examples:

Great Falls Mfg. Co. vs. Worster, 23 N. H., 462:

Suit in New Hampshire to enjoin the destruction of the portion of a dam situated in Maine, the other half thereof being situated in New Hampshire.

Schmaltz vs. York Mfg. Co., 204 Pa. St., 1:

Suit to enjoin a person who had sold a refrigerator plant from removing the same when it had become attached to realty in another State.

Alexander vs. Tolleston Club, 100 Ill., 65:

Suit to enjoin defendant from interfering with a right of way granted by defendant in another State.

Williams vs. Ayrsault, 31 Barb., 364:

Action to cancel a mortgage which is a lien on property in another State on the ground that the mortgage was void for usury.

Manley vs. Carter (Kans.), 52 Pac., 915:

Action to enforce a trust as to property situated in another State.

Willey vs. St. Charles Hotel Co., 52 Pac. (La.), 182, 187:

In marshalling assets court considered property situated in another State.

Clad vs. Paist, 181 Pa. St., 148:

Action to enjoin interference with a boulevard laid out by defendant situated in another State.

Remer vs. McKay, 54 Fed., 432, 434:

Suit to declare void a judgment and to remove it as cloud upon land in another State.

Massie vs. Watts, 6 Cr., 148:

Action to charge defendant as trustee in respect to certain lands in another State alleged to have been obtained by fraud.

Muller vs. Downs, 94 U. S., 444:

Suit by trustee to foreclose mortgages of a railroad situated in two States. The court ordered the entire property sold by the master, and directed a conveyance by him, also by the trustee and the railroad. The decree was upheld, the court saying (page 449):

"If such a foreclosure and sale cannot be made of a railroad which crosses a State line and is within two States, when the entire line is subject to one mortgage, it is certainly to be regretted; and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two States. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State, it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another juris-

diction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath vs. R. R. Co.*, 55 Pa., 189, a bill for foreclosure of a mortgage, in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

Phelps vs. McDonald, 99 U. S., 298:

In this case the defendant, a bankrupt, being the owner of a claim against the British Government, had the claim sold by the trustee in bankruptcy and then conveyed to him for $20. The claim was allowed for $187,190. In sustaining the jurisdiction of the court to reach the fund, although situated in a foreign country, the court said (page 308):

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could

do voluntarily, to give full effect to the decree against him.

"Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam*, according to those equities, and enforce obedience to their decrees by process *in personam*."

Cole vs. Cunningham, 133 U. S., 107:

In this case a resident of Massachusetts was enjoined from prosecuting attachment suits in New York against property of an insolvent debtor, which were instituted for the purpose of obtaining a preference forbidden by the laws of the State of Massachusetts.

The injunction was granted

"on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience, and that, as the decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

* * * * * * *

"The defendants, being citizens of this State, are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws are intended to secure."

The court based its decision on the following authorities:

1. *Penn vs. Lord Baltimore*, 1 Ves. Sr., 444,

in which—

"Lord Hardwicke recognized the principle that equity, as it acts primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or any equity

subsisting between the parties, respecting property situated out of the jurisdiction."

2. *Pennoyer vs. Neff*, 95 U. S., 714,

where Mr. Justice Field stated that persons could be compelled to make conveyances

"In pursuance of their contracts respecting property elsewhere situated."

3. *Lord Partarlington vs. Soulby*, 3 *Myl. & K.*, 104,

where Lord Chancellor Broughton placed the power to enjoin suits in a foreign jurisdiction

"on the circumstance of the person of the party on whom the order is made, being within the power of the court."

4. *Story's Equity Jur.*, secs. 899, 900,

where the rule is broadly stated that the courts

"consider the equities between the parties, and decree *in personam* according to those equities" and "as the ends of justice may require."

5. *Snook vs. Snetzer*, 25 Oh. St., 516;
Keyser vs. Rice, 47 Md., 203;
Burlington & M. R. R. Co. vs. Thompson, 31 Kan., 180;
Kidder vs. Tufts, 48 N. H., 121;
Wilson vs. Joseph, 107 Ind., 490,

holding that a citizen of a State might be enjoined from attaching the debtor's property in another State for the purpose of evading the exemption law of the State of his domicile.

6. *Vail vs. Knapp.*, 49 Barb., 299,

where citizens of New York were enjoined from continuing attachment suits in Vermont upon the ground that they were proceeding in Vermont in evasion of the laws of New York.

7. *Dinsmore vs. Neresheimer,* 32 Hun., 204,

where a resident was enjoined from prosecuting an action in the District of Columbia

> "to avoid a decision of the Court of Appeals of New York, differing from the rule upon the same subject in the District of Columbia."
>
> *Erie R. Co. vs. Ramsey,* 45 N. Y., 637, to the same effect.

8. *Sercomb vs. Cathin,* 128 Ill., 556:

To the effect that the courts of Illinois on the application of a receiver appointed by them could enjoin a person within the jurisdiction of the court from interfering in respect to property belonging to an insolvent co-partnership of which the receiver had been appointed, although that property was outside of the jurisdiction.

9. *Dehorn vs. Foster,* 4 Allen, 545:

In which

> "Bigelow, Ch. J., points out that the jurisdiction of a court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits upon a proper case made either in the courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that as a decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting this action in the courts of another State or country."

Moran vs. Sturges, 154 U. S., 286:

In this case the State court had appointed a receiver, but before he had qualified or taken possession of the property the United States marshal took possession under a maritime libel. The State court undertook to enjoin the prosecution of the libel, but the court held that the possession of the marshal having attached before the State court took possession, the libel might proceed. In holding, however, that if the State court had actually obtained possession before the institution of the libel it would have been proper to have enjoined the prosecution of the libel, the court fully reviewed the authorities to the following effect:

1. In regard to the cases of *French vs. Hay,* 89 U. S., 250 (where after a removal of the cause to the Federal courts a suit was instituted on a decree rendered before the removal), and *Providence, etc. Co. vs. Hill Mfg. Co.,* 109 U. S., 578 (where suits were enjoined under proceedings for limitation of liability), the court said:

> "These were all cases in which the issue of an injunction to a State court had been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a court of the United States of its lawful jurisdiction over particular persons or things."

2. It cited with approval the case of *Gaylord vs. Ft. Wayne M. & C. R. Co., 6 Biss.,* 286, where it is stated:

> "We think that there is no other safe rule to adopt in our mixed system of State and Federal jurisprudence than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res,* is entitled to retain it until the litigation is settled."

3. It cited with apparent approval the case of *Home Insurance Co. vs. Howell,* 24 N. J. Eq., 238, where a suit had been instituted to cancel insurance policies and the court

enjoined an action brought in another State on the policies, and in which it was said:

> "When a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may by the ordinary process of injunction and attachment for contempt compel him to desist from commencing a suit at law, either in this State or any foreign jurisdiction, and of course from prosecuting one commenced after the bringing of the suit in this court."

4. It approved the case of *Cole vs. Cunningham*, 133 U. S., 107, *supra*, but pointed out that the jurisdiction exercised in that case against a resident of the State in which the insolvency proceedings were pending would not be exercised against a non-resident who was not bound by the laws of the State in which such proceedings were instituted, citing *Reynolds vs. Adden*, 136 U. S., 348; *Worthington vs. Lee*, 61 Md., 530.

5. In regard to *Gaylord vs. Ft. Wayne, etc., Co.*, 6 Biss., 286, and *Home Ins. Co. vs. Howell*, 24 N. J. Eq., 238, *supra*, the court said:

> "It will be perceived that the principle invoked in such cases as *Gaylord vs. Ft. Wayne, etc., Co.* and *Home Ins. Co. vs. Howell, supra*, is that courts for the purpose of protecting their jurisdiction over persons and subject-matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession, *or identical controversies therein pending*, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction."

6. Mr. Justice Brewer, in concurring as to the general principle involved, but dissenting as to its application in this particular case, said:

> "I agree that it is a rule of general application that where property is in the actual possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court; and I may say that I agree further that where a court has possession of property it may restrain the bringing of any suit in any other court to disturb that possession, and that an order for such restraint operates upon all persons within its jurisdiction and can be enforced, if need be, by proceedings as for a contempt."

Dull vs. Blackman, 169 U. S., 243:

In this case the court stated that where a court of one State had jurisdiction of the parties it might *in effect* quiet title to land in another State.

Fall vs. Eastin, 215 U. S., 1:

In this case it was held that while a decree compelling the conveyance of land in another State did not *ipso facto* act upon the title, it was binding upon the parties.

Counsel seem to think that we contend broadly that a court of equity would have authority to enjoin an injury to property situated entirely in another State, although there was no relation of trust, fraud, contract, or other equity between the parties, and the only ground of equitable relief was the nature of the relief sought. Such was the case of *Northern Indiana R. Co. vs. Mich. Cent. R. Co.*, 15 How., 233. We make no such broad claim, nor is any such position necessary in this case. What we do claim is that when the court, as in this case, has undoubted jurisdiction over property within the State, it may consider rights in prop-

erty out of the State in order to do complete justice between the parties, just as this court affirmed a decree of a court in one State directing the sale of a railroad situated in two States.

Muller vs. Downs, 94 U. S., 444, *supra*.

Owners on a stream are tenants in common of the stream, and equity has complete jurisdiction to determine and regulate their respective rights.

17 Am. & Eng. Ency. of Law (2d ed.), 70.

Conclusion.

In presenting this case we have done so on the theory of the petitioner that the wrongful acts alleged to have been committed by Rickey were committed entirely in the State of California, but we believe that it could be strongly argued that those acts were committed in Nevada as well as in California. The complaint in the original case of *Miller & Lux vs. Rickey*, after alleging the rights of the complainant, alleges that the defendant is diverting and threatens to divert water from the river above the lands and canals of the complainant so as to deprive complainant of the water to which it is entitled. To this the defendant Rickey pleads that he is diverting and using all the water diverted and used by him entirely in the State of California. In considering the effect of this plea it should be remembered that a riparian owner in the State of California has a legal right to divert the water within the State of California, provided it is returned to the stream before reaching another party entitled to the water. In other words, the right of the complainant, Miller & Lux, is to have the water reach its lands and points of diversion in the State of Nevada, and the wrong complained of is that the water, by reason of the acts of the defendant, does not flow to that point. The act of the defendant therefore would never become

wrongful, provided the water was returned to the river at any time before reaching the land of the complainant, and therefore the act complained of is not only the physical diversion of the water in the State of Nevada, but his act in continually keeping the water out of the channel of the river through the State of California and the State of Nevada to the land of complainant.

In this connection the inconsistency of the position of the petitioner should not be overlooked. In the suit filed by petitioner in the State of California it is claimed that the petitioner is the owner of the right to divert over fifteen hundred cubic feet of water flowing per second from the Walker River, and it seeks by that suit to have its title and right thereto quieted as against Miller & Lux, a riparian owner and appropriator entirely in the State of Nevada. It cannot be assumed that that suit was brought without any useful purpose, and it must be assumed that petitioner expects that the courts of California in that case will adjudge that the petitioner has the right therein claimed, and that the court will quiet its title thereto as against Miller & Lux, the Nevada riparian owner and appropriator. In order to do so it must necessarily not only determine the right of the petitioner, but likewise the absence of any right in Miller & Lux which is in any way inconsistent with the right of the petitioner. Petitioner urges in all stages of the argument that water rights have a definite *situs*, and that the *situs* of its water rights is the State of California. Assuming this to be true, it must be equally true that the *situs* of the water rights of Miller & Lux is the State of Nevada, and it is difficult to see how if can be contended that a court of the State of California may, in protecting water rights in that State, determine rights having a *situs* in the State of Nevada, but that courts of Nevada, in protecting rights having a *situs* in that State, are unable to pass upon conflicting rights having a *situs* in the State of California.

It must therefore be clear that, whether water rights have

or have not a definite *situs*, the courts of each State through which the stream flows have concurrent jurisdiction to determine such rights.

In the same connection, the Court should not overlook the obvious fact that the action in the State of California was brought for no purpose other than that of interfering with the jurisdiction already acquired by the United States Circuit Court of the District of Nevada. Rickey is an upper riparian owner and could in no way be injured by any adverse claim made by Miller & Lux, a lower riparian owner and appropriator. A diversion or appropriation by Miller & Lux below the land of Rickey would not be adverse to him and could never ripen into a proscriptive right as against him. In fact, some courts have gone so far as to hold that an upper riparian owner can maintain no action of any kind as against a lower appropriator.

Stockport Waterworks Co. v. *Potter*, 3 H. & C., 326.
Larimer & etc. Co. v. *Water Supply etc. Co.*, 7 Colo. App., 225.
Chapman v. *Copeland*, 55 Miss., 478.

Without taking this advanced position, it must be obvious that by the institution of that suit Rickey had no thought of righting any wrong committed by the defendants or any wrong which they were in a position to possibly commit, but that the same was instituted for the mere purpose of interfering with the prior jurisdiction of the United States courts.

We therefore respectfully submit that complainant's land and water right are situated in the State of Nevada; that defendant's acts, whether committed in the State of California or in the State of Nevada, have injured property situated in the State of Nevada; that a court of Nevada has jurisdiction to protect property within its jurisdiction from such injury; that in exercising that jurisdiction it must necessarily have power not only to determine the right of the complainant in the State of Nevada, but if the defendant

by way of defense sets up conflicting rights in the stream in the State of California the court has like power to adjudicate such rights, and having acquired jurisdiction to adjudicate such rights will enjoin the defendant from seeking an adjudication thereof in an action subsequently commenced in another jurisdiction. The Circuit Court of Appeals has clearly and correctly so ruled. We submit the decree should be affirmed.

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